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In the Supreme Court of the United States

OCTOBER TERM. 1925.

No. [redacted]87

GEORGE M. NAPIER, Attorney General of the State of Georgia,

Appellant,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF OF APPELLANT.

GEORGE M. NAPIER,
Atty. General of the State of Georgia.

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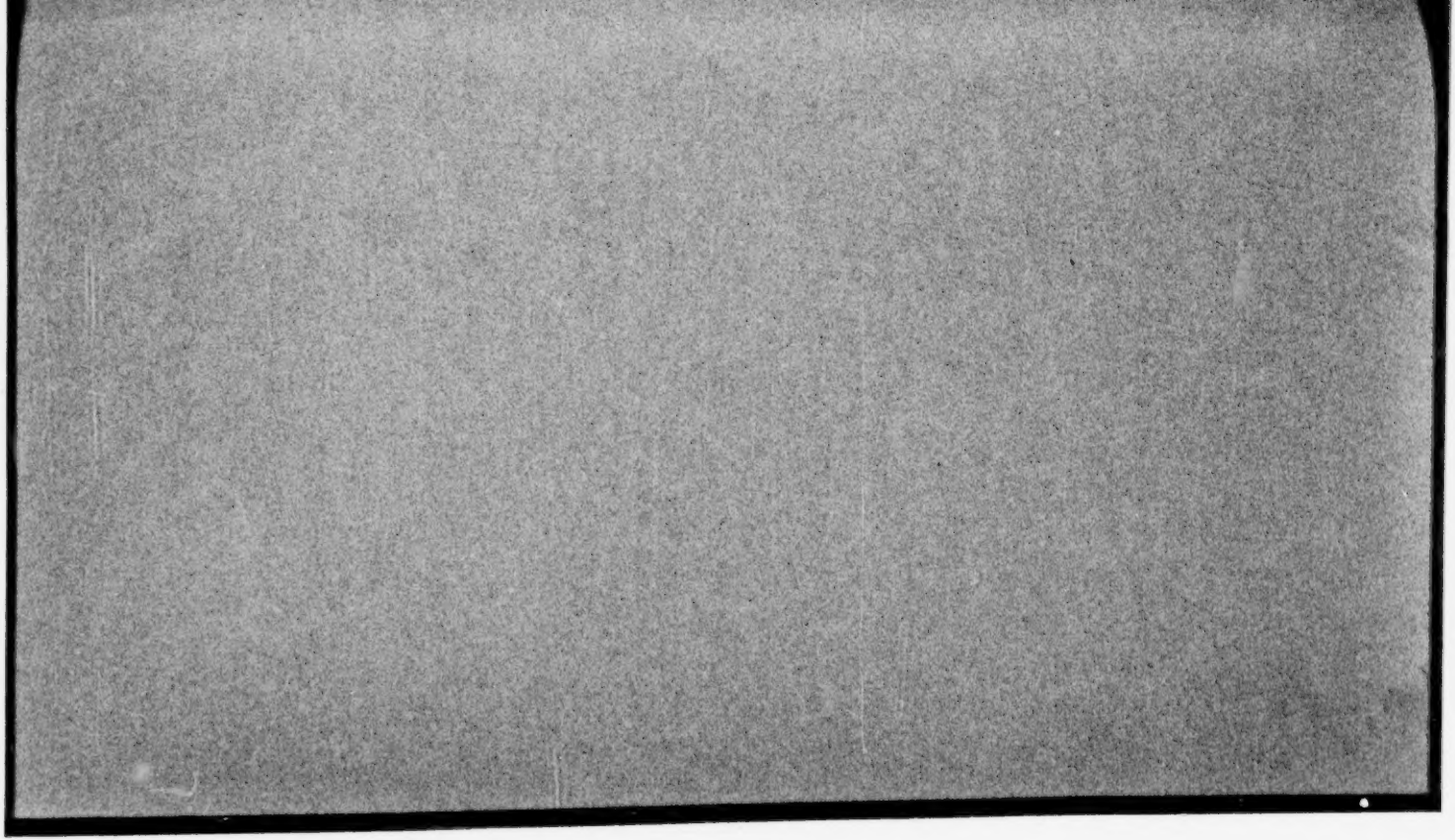

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In the Supreme Court of the United States

October Term. 1925.
No. 386.

George M. Napier, Attorney General of the State of Georgia,
Appellant,

vs.

Atlantic Coast Line Railroad Company,
Appellee.

Appeal from the District Court of the United States for the Northern District of Georgia.

BRIEF OF APPELLANT.

REPORT OF OPINION IN COURT BELOW.

The opinion of the District Court is reported in *Atlantic Coast Line R. Co. vs. George M. Napier, Attorney General, et al.*, 2 Fed. Rep. 2nd Series 891.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgment in this case was filed December 23rd, 1924. (R. 17.) The Bill of Complaint alleged, by amendment filed and allowed December 19th, 1924 (R. 11) that an act of the legislature of the State of Georgia is void for the reason that it violates the Commerce Clause of the Constitution of the United States of America. The Court below held (R. 18) the act to be invalid in so far as it undertakes to apply to locomotives within the provi-

sions of the Act of Congress approved February 17, 1911, and the Act amending the same approved March 4th, 1915, and the Act approved June 7, 1924, further amending the same, the original Acts of Congress being entitled:

> "An Act to promote the safety of employes and travellers upon railroads, by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto."

This appeal is brought under Judicial Code Sec. 238; Sec. 1215 Comp. Stat. 1918, 36 Stat. at L. 1157, Chap. 231, which provides, among other things, that:

> "Appeals and Writs of Error may be taken from the district courts * * * direct to the Supreme Court in the following cases; * * * and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

Hays vs. Seattle, 251 U. S. 233, 64 L. ed. 243, 40 Sup. Ct. 125;

Greene vs. Louisville & Interurban R. Co., 244 U. S. 499, 61 L. ed. 1280, 37 Sup. Ct. 673;

Myles Salt Company vs. Board of Commrs., 239 U. S. 478, 60 L. ed. 392;

Shaffer vs. Carter, 252 U. S. 37, 44; 64 L. ed. 445, 453.

STATEMENT OF THE CASE.

This is an appeal from a final decree entered in the District Court of the United States for the Northern District of Georgia, Northern Division, adjudging an Act of the State of Georgia to be invalid and enjoining the defendants from applying the provisions of the said Act to the locomotives of the complainant.

At its 1924 Session the Legislature of the State of Georgia enacted a law which was approved on the 13th

day of August 1924 (1924 Laws of Georgia 173) said Act being entitled:

"An act to require all steam railroad companies operating steam locomotive engines on its railroad or railroads in or through this State, to provide and equip each and every steam locomotive so operated over its said road or roads in this State with an automatic door to the firebox of such locomotive engine; to provide how the same shall be constructed and operated; to provide a penalty for steam railroad company who fails to provide and maintain in good condition such automatic fire box doors, and for other purposes.

SECTION 1.

Be it enacted by the General Assembly of the State of Georgia and it is hereby enacted by authority of the same, That all steam railroad companies operating steam locomotive engines on its railroad or railroads in or through this State, shall provide and equip each and every steam locomotive engine so operated over its said road or roads in this State with an automatic door to the fire box of such locomotive engine. Such automatic door shall be so constructed and operated by steam, compressed air or electricity, as deemed best and most efficient by officer of such railroad. The device for operating such door shall be so constructed that it may be operated by the fireman of said engine by means of a push button or other appliance located on the floor of the engine deck or floor of the tender at a suitable distance from such floor to enable the fireman while firing such engine by pressure with his feet to operate such door for firing of such engine.

SECTION 2.

Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by authority of the same, That each and every steam railroad company failing to provide and maintain in good condition and working order an automatic fire box door

as in the first section of this Act required and provided for, shall be guilty of a misdemeanor and shall be liable to a fine of not less than One Hundred Dollars nor more than Five Hundred Dollars for each and every day such locomotive is operated in this State without such automatic door: Provided, however, That the provisions of this Act shall not apply to locomotive engines weighing less than 125,000 pounds on the driver or less than 21 inch cylinders, or logging or tramroads or mechanical fired engines."

On the 12th day of November, 1924, the Atlantic Coast Line Railroad Co., appellee, filed its bill of complaint in the District Court of the United States for the Northern District of Georgia, Northern Division, praying that George M. Napier, Attorney General of the State of Georgia, appellant, be enjoined from enforcing said Act of the State of Georgia and that said Act be declared null and void for the following reasons:

(a) Jurisdiction of this subject has been taken by the Congress of the United States of America, especially under the Acts of Congress known as the Federal Boiler Inspection Act, the original of which was approved February 17, 1911, and an amendment thereto, which was approved on March 4, 1915. (R. 5.)

(b) The said Act of the Georgia Legislature is a burden upon interstate commerce and is in violation of the section of the Constitution of the United States empowering Congress to regulate commerce between the states and foreign countries. (R. 6.)

(c) If appellee should adopt one kind of automatic fire box door and the Interstate Commerce Commission under the powers conferred upon it by the aforementioned Acts of Congress should order another, the ones installed would then be useless. (R. 7.)

(d) Appellee further avers that the aforementioned Act deprives appellee of its property without due process of law and deprives it of equal protection of the law, contrary to the provisions of the Four-

teenth Amendment to the Constitution of the United States. (R. 7.)

(e) The Act of the Legislature of the State of Georgia is void for the reason that it violates the commerce clause of the Constitution of the United States of America. (R. 11.)

The appellee relies upon the Federal Boiler Inspection Act 36 Stat. L. 913, approved February 17, 1911, and Amendment thereto of March 4, 1915, 38 Stat. L. 1192 and contends that by these acts the Congress of the United States has exercised jurisdiction of this subject to the exclusion of the states. This act is also found in the Compiled Statutes of the United States, Sections 8631 to 8639 d. The Act is entitled:

"An act to promote the safety of employees and travellers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto."

Section 2 provides:

"From and after the first day of July, nineteen hundred and eleven, it shall be unlawful for any common carrier, its officers or agents, subject to this act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb, and all boilers shall be inspected from time to time in accordance with the provisions of this act, and be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

The sections following provide for a system of inspection, the appointment of inspectors, how rules for

inspection shall be formulated and promulgated, the duties of inspectors, how the act shall be enforced and the penalty.

The amendment of March 4, 1915, 38 Stat. L. 1192 provides:

"Sec. (1) That section two of the act entitled 'an act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto,' approved February seventeenth, nineteen hundred and eleven, shall apply to and include the entire locomotive and tender and all parts and appurtenances thereof.

Sec. (2) The chief inspector and the two assistant chief inspectors, together with all the district inspectors, appointed under the act of February seventeenth, nineteen hundred and eleven, shall inspect and shall have the same powers and duties with respect to all the parts and appurtenances of the locomotive and tender that they now have with respect to the boiler of a locomotive and the appurtenances thereof, and the said act of February seventeenth, nineteen hundred and eleven, shall apply to and include the entire locomotive and tender and all their parts with the same force and effect as it now applies to locomotive boilers and their appurtenances. That upon the passage of this act all inspectors and applicants for the position of inspector shall be examined touching their qualifications and fitness with respect to the additional duties imposed by this act.

Sec. (3) Nothing in this act shall be held to alter, amend, change, repeal or modify any other act of Congress than the said act of February seventeenth, nineteen hundred and eleven, to which reference is herein specifically made, or any order of the Interstate Commerce Commission promulgated under the safety appliance act of March second, eighteen hundred and ninety-three, and supplemental acts."

SPECIFICATION OF ERRORS.

For a reversal of this case we rely upon the assertion that the court below erred in the following and each of the following respects, which are set forth in the assignment of errors filed in the court below (R. 19) to wit:

> "First. The Court erred in holding that the Act of the Legislature of the State of Georgia, approved on the 13th day of August, 1924, and entitled:
>
> > 'An Act to require all steam railroad companies operating steam locomotive engines on its railroad or railroads in or through this State, to provide and equip each and every steam locomotive so operated over its said road or roads in this State with an automatic door to the firebox of such locomotive engine; to provide how the same shall be constructed and operated; to provide a penalty for steam railroads who fail to provide and maintain in good condition such automatic firebox doors, and for other purposes,'
>
> to be unconstitutional and invalid insofar as it undertakes to apply to locomotives within the provisions of the Act of Congress approved February 17, 1911, and the Act amending the same approved March 4, 1915, and the Act approved June 7, 1924, further amending the same, the said original Act of Congress being entitled:
>
> > 'An Act to promote the safety of employees and travelers upon railroads, by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto.'
>
> Second. The court erred in decreeing that the defendant be enjoined from applying the said Act of the Legislature of Georgia to locomotives of complainant with the provisions of the aforementioned Act of Congress."

POINTS AND AUTHORITIES.

NO POWER TO ORDER THE USE OR INSTALLATION OF EQUIPMENT OF ANY KIND IS GIVEN THE INTERSTATE COMMERCE COMMISSION BY THE FEDERAL BOILER INSPECTION ACT OF 1911 OR THE AMENDMENTS THERETO.

Baltimore and Ohio R. Co. vs. Groeger, 266 U. S. 521, 45 Sup. Ct. Rep. 169;

Vandalia Railroad Co. vs. Pub. Service Comm., 242 U. S. 255, 61 L. ed. 276.

WHERE THE BODY OF A STATUTE IS FREE FROM AMBIGUITY IT CANNOT BE MODIFIED OR ENLARGED BY RESORT TO THE TITLE.

Caminetti vs. United States, 242 U. S. 470, 490, 61 L. ed. 442, 455;

Makenzie vs. Hare, 239 U. S. 299, 308, 60 L. ed. 297, 300;

Lapina vs. Williams, 232 U. S. 78, 92; 58 L. ed. 515, 520.

POWERS NOT EXPRESSLY GIVEN CANNOT BE IMPLIED.

Atlantic Coast L. Ry. Co. vs. Georgia, 234 U. S. 280, 292; 58 L. ed. 1312, 1318;

Baltimore and O. Ry. Co. vs. Groeger, 266 U. S. 521, 45 Sup. Ct. Rep. 169;

Vandalia Ry. Co. vs. Public Service Comm., 242 U. S. 255, 259; 61 L. ed. 285;

United States vs. Pennsylvania Rd. Co., 242 U. S. 208, 221; 61 L. ed. 251, 261;

I. C. C. vs. Cinn. N. O. & T. P. Ry. Co., 167 U. S. 479, 494; 42 L. ed. 243, 251.

THE LIMITED FIELD OF REGULATION OCCUPIED BY CONGRESS CANNOT BE CONSTRUED INTO AN INTENTION TO ENTIRELY OCCUPY THE FIELD TO THE EXCLUSION OF THE STATES.

Roberts Federal Liabilities of Carriers, Vol. 1, Sec. 17, pg. 57;

Missouri K. T. R. Co. vs. Harris, 234 U. S. 412, 417; 58 L. ed. 1377, 1381;

Missouri P. R. Co. vs. Larabee Flour Mills Co., 211 U. S. 612, 623; 53 L. ed. 352, 361;

Southern R. Co. vs. Reid, 222 U. S. 424, 437; 56 L. ed. 257, 260;

Sinnot vs. Davenport, 22 How. 227, 243; 16 L. ed. 243, 247;

Savage vs. Jones, 225 U. S. 501, 533; 56 L. ed. 1182, 1194;

Lake Shore and Michigan S. Ry. vs. State of Ohio, 173 U. S. 285; 43 L. ed. 702.

THE REGULATIONS MADE BY CONGRESS ARE LIMITED TO THE FIELD OF SAFETY. THE AUTOMATIC FIREDOOR REQUIRED BY THE GEORGIA STATUTE IS NOT PRIMARILY INTENDED TO PROMOTE SAFETY AND IS SUBJECT TO STATE REGULATION.

Chicago and N. W. Ry. Co. vs. Railroad Comm. of Wisc., 205 N. W. 932 (Wisc.).

THE STATE OF GEORGIA MAY PROTECT THE TRAVELLERS UPON ITS HIGHWAYS AND THE STATUTE REQUIRING AUTOMATIC FIREDOORS HAS A REASONABLE RELATIONSHIP TO THAT END.

Erie R. R. Co. vs. Public Utility Commissioners, 254 U. S. 394, 410; 65 L. ed. 322, 333;

Erb vs. Morash, 177 U. S. 584, 587; 44 L. ed. 897, 898;

Crutcher vs. Kentucky, 141 U. S. 47, 61; 35 L. ed. 649, 653.

THE STATUTE OF THE STATE OF GEORGIA IS A VALID EXERCISE OF THE RESERVED POLICE POWER AND IS NOT A REGULATION OF COMMERCE.

Atlantic C. L. Ry. Co. vs. Georgia, 234 U. S. 280, 58 L. ed. 1312;

Smith vs. Alabama, 124 U. S. 465, 481; 31 L. ed. 508, 513.

Lake Shore & M. S. R. Co. vs. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465;

Missouri P. R. Co. vs. Larabee Flour Mills Co., 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214;

Missouri P. R. Co. vs. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330;

Chicago R. I. & P. R. Co. vs. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275;

Minnesota Rate Cases (*Simpson vs. Shepard*), 230 U. S. 352, 402, 410, 57 L. ed. 1511, 1542, 1546, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729.

CONGRESS HAS DEFINITELY RESERVED TO ITSELF ALL POWER TO ORDER EQUIPMENT OF ANY KIND.

Atlantic C. L. Ry. Co. vs. Georgia, 234 U. S. 280; 58 L. ed. 1312;

Sec. 26 Transportation Act 1920; 41 Stat. L. 498; U. S. Comp. Stat. Supp. 1923. Sec. 8596. b.

IN THE ABSENCE OF THE EXERCISE OF THE POWER TO REGULATE BY CONGRESS SUCH POWER IS RESERVED TO AND MAY BE EXERCISED BY THE STATES.

Atlantic C. L. Ry. Co. vs. Georgia, 234 U. S. 280, 291; 58 L. ed. 1312;

Vandalia R. Co. vs. Public Service Comm., 242 U. S. 255; 61 L. ed. 276.

BRIEF OF ARGUMENT.

The only issue presented by this record is the legal proposition that by virtue of the Federal Boiler Inspection Act and its Amendments, enacted pursuant to the commerce clause of the Constitution of the United States, the Congress of the United States has occupied the "entire field" of legislation with respect to steam locomotives of common carriers engaged in interstate commerce and therefore the law of the State of Georgia, providing that certain locomotives be equipped with an automatic door to the firebox and any action on the part of the Attorney General of Georgia seeking to enforce compliance with that law would be in conflict with the paramount power of Congress, in violation of the Federal Law and of the Constitution of the United States.

At the outset it is important to note that **The Congress of the United States has Not Enacted Any Law Dealing with the Subject of Firedoors, nor has the Interstate Commerce Commission, by Virtue of the Federal Boiler Inspection Law or Any Other Law, Promulgated Any Rule or Regulation Dealing with that Subject.**

Under these circumstances it is not and can not be contended that there is an actual conflict or repugnancy between the law of the State of Georgia here in issue and some Federal law or regulation, but the contention is that by the enactment of the Boiler Inspection Law, the Congress has indicated an intention to fully occupy the field to the exclusion of the states.

NO POWER TO ORDER THE USE OR INSTALLATION OF EQUIPMENT OF ANY KIND IS GIVEN THE INTERSTATE COMMERCE COMMISSION BY THE FEDERAL BOILER INSPECTION ACT OF 1911 OR THE AMENDMENTS THERETO.

Stating the position of appellant in negative form it is not our contention that the Interstate Commerce Commission is without power to require equipment of any kind. We most earnestly contend, however, that the Boiler Inspection Act, if it gives power to the Commission to require equipment, is strictly limited to such as is "essential" to "safety in operation." The court below gives weight to the fact that the commission has required such appurtenances as headlights, cab windows, whistles and sanding apparatus, and states this "is practical construction by it of its powers." (R. 17) The court also points out (R. 16) that:

> "The Chief Inspector has several times reported the desirability of automatic firedoors, such as are required by the Georgia statute, but the carriers have not proposed nor the Commission required a rule of inspection providing for these."

We respectfully submit this failure or refusal is a much weightier construction of its powers by the Commission. Section 7 of the Act makes it the duty of the Chief Inspector to make an annual report to the Commission and to make such recommendations for the betterment of the service as he may desire. In several annual reports the installation of automatic firedoors has been recommended. The Commission is not left impotent by the law. It is not required to await action by the carriers for a rule on such recommendations. It has the power to promulgate rules. We contend that the fact it has not acted on the recommendation of the Chief Inspector, made

in compliance with the law, is a clear indication of its opinion that it lacks the power to order such equipment by rule.

Paragraph (1) of the act contains various definitions. Paragraph (2) declares that after a date certain it shall be unlawful for any common carrier to use any locomotive engine propelled by steam power in interstate commerce "unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put." It is then provided that all boilers shall be inspected from time to time in accordance with the provisions of the act and be able to withstand such test or tests as may be provided in the rules and regulations provided for.

Section 3 provides for the appointment of boiler inspectors and sets forth their duties which are:

> "They shall have general superintendence of the inspectors hereinafter provided for, direct them in the duties hereby imposed upon them, and see that the requirements of the act and the rules, regulations and instructions made or given hereunder are observed by common carriers subject hereto."

Section 4 provides that the country shall be divided into districts, fifty inspectors appointed and assigned to the various districts and gives the qualifications of the inspectors.

Section 5 provides that each carrier subject to the act shall file its rules and instructions for the inspection of locomotive boilers with the chief inspector within three (3) months after the approval of the act and after hearing and approval by the Interstate Commerce Commission such rules and instructions with such modifications as the commission requires shall become obligatory upon the carrier. It then provides that if any carrier subject to

the act fails to file its rules and instructions, the chief inspector shall promulgate rules and regulations and that after the same had been approved by the commission and served upon the carrier, the same should become obligatory.

It will be noted that this section of the act assumes that the carriers have rules and regulations and that there is an inspection system in force on the various carriers. To provide uniformity as nearly as possible, inspection by the carrier is made obligatory, and such inspections must be made either under rules and regulations approved by the commission or promulgated by it.

Section 6 of the act sets forth the duties of the various inspectors. Among other things it is provided, with respect to the inspector:

> "His first duty shall be to see that the carriers make inspections in accordance with the rules and regulations established or approved by the Interstate Commerce Commission and that carriers repair the defects which such inspections disclose before the boiler or boilers or appurtenances pertaining thereto are again put in service."

The act then provides that the carriers shall file reports; that inspectors may order defective locomotives out of service, for appeals from such action of inspectors, for an annual report of the chief inspector, for report and investigation of accidents. A penalty is provided and the method and manner of enforcement.

The amendment of March 4, 1915, merely provides that the provisions of the original act shall extend to and cover the locomotive, the tender and all their parts and appurtenances and that the inspector shall have the same duties and powers with respect thereto as the original act gave with reference to the boilers.

Acting under authority of the original act the Interstate Commerce Commission established a set of "Rules

and instructions for inspection and testing of locomotive boilers and their appurtenances." The first statement of the first rule is a clear indication of the view the Interstate Commerce Commission takes of the limited powers that were delegated to it by this act. It is as follows:

RESPONSIBILITY FOR THE GENERAL CONSTRUCTION AND SAFE WORKING PRESSURE.

"1. The railroad company will be held responsible for the general design and construction of the locomotive boilers under its control."

By its first pronouncement the commission disavowed any power or authority to order the carrier, by virtue of the provisions of this act, to adopt any particular design or construction of its boilers or to adopt in the boilers used any parts or appliances. It placed the whole burden as to the safety of the design, construction, and appliances on the carrier. We submit that if the commission considered that it had power or authority under the Original Federal Boiler Inspection Act to order the carriers to use any particular equipment, some provision would have been made in the first regulation whereby the commission would have indicated that it at least retained control over the questions of design, construction and parts to be used.

The regulations adopted and promulgated by the commission plainly indicate they are drawn on the assumption that the item to which the regulation is directed is in use, and the regulations are in the nature of establishing "standards of safety" to which standards the matters under regulation must comply. In a few instances the language of the regulation states that a boiler "shall have, etc. * * *," but as a general rule the regulation simply states that the item under regulation shall comply with the standard set for it. Wherever the regulation states that the boiler "shall have" a particular appliance, it is

plain that the item referred to is an indispensable part of or appurtenance to the boiler or locomotive and essential to safety in operation. For instance:

Rule 28. Provides "Every boiler shall have at least one steam gauge."

Rule 34. Every boiler shall be equipped with at least two safety valves.

Rule 37. Every boiler shall be equipped with at least one water glass and three gauge cocks.

Rule 41. All tubular water glasses and lubricator glasses must be equipped with safe and suitable shield.

Rule 42. All water glasses must be supplied with a suitable lamp.

Rule 119. Cylinder cocks shall be provided and maintained in safe and suitable condition for service.

Rule 120. Locomotives shall be equipped with sanding apparatus.

Rule 121. Each locomotive must be provided with suitable steam whistle.

Rule 122. Provides for two or more safety bars or safety chains between locomotive and tender.

Rule 129. (a) Provides for head lights.

Rule 130. Classification lamps.

Rule 132. Cab lights.

It will be noted that wherever the regulation provides that the locomotive or its boiler "shall have" any named item, the appliance is beyond question a safety appliance, and the conclusion to be reached from the language used by the commission is that the absence of the particular item would, under the rules and regulations, render the locomotive below the required standard, unsafe for operation and it would be ordered out of service.

We submit that if the commission should undertake by regulation to compel the carriers to equip their loco-

motives with any device in which it was debatable whether or not the same was "essential" to "safety in operation" such a regulation would be held by the courts to be unreasonable and inoperative. The commission has undoubtedly recognized this situation and has narrowed the use of the mandatory term "shall have" to such items as are "essential" to "safety in operation" beyond debate. The items so specified are steam gauges, safety valves, water glass and gauge cocks, water and lubricator glass shields, water glass lamps, sanders, whistles, safety bars or safety chains, headlights, classification lamps and cab lights.

It is instructive to compare the language used by the commission in Rule 14 with reference to fusible plugs. The necessity of fusible plugs and even the wisdom of them is open to debate, but who would say that there is any reasonable question as to the absolute necessity of steam gauges, safety valves, water glasses, headlights, etc.? Recognizing the situation with reference to fusible plugs, the commission simply made a rule that if boilers are equipped with fusible plugs, they shall be removed and cleaned at least once every month, but did not make any rule that boilers shall be equipped with fusible plugs. Thousands of locomotives are being used daily without fusible plugs, but can it be conceived that a locomotive would be used without head lights, safety valves, water gauges, etc.?

Even though the commission in the rules and regulations has, with reference to particular items, used mandatory language, this form has been used to indicate that such item is considered an absolute necessity to safety in operation. Failure to provide the item mentioned would necessitate taking the locomotive out of service for the reason that it was unsafe to operate. This would probably produce the same result—namely, of compelling the

carrier to use the specific equipment,—but we submit that this is fundamentally different from the commission having power to *order* the carrier to install the particular equipment. In particular instances the same result will be achieved indirectly by ordering the locomotive out of service, but the distinction is fundamentally of vital importance.

The meaning, purpose and scope of the Boiler Inspection Act were discussed by this Court in the case of *Baltimore and O. R. Co. vs. Groeger,* 266 U. S. 521; 45 Sup. Ct. 169. This was an action for damages arising out of the death of an engineer. The provisions of this law were drawn in question. In the course of the opinion this Court said by Mr. Justice Butler (page 528):

> "By the last mentioned section (section 2) defendant was bound absolutely to furnish what before, under the common law, it was its duty to exercise ordinary care to provide. The carriers were left free to determine how their boilers should be kept in proper condition for use without unnecessary danger. *The things required for that purpose were not prescribed or changed by the act;*" etc. (Italics ours)

The court further said (page 530):

> "The act required a condition which would permit use of the locomotive without unnecessary danger. *It left to the carrier the choice of means to be employed to effect that result.* * * * There is a multitude of mechanical questions involved in determining the proper construction, maintenance and use of the boilers, other parts of locomotives, their tenders and appurtenances, all of which are covered by the Boiler Inspection Act, as amended. Inventions are occurring frequently, and there are many devices to accomplish the same purpose. Comparative merits as to safety or utility are most difficult to determine. *It is not for the courts to lay down rules which will operate to restrict the carriers in their choice of mechanical*

means by which their locomotives, boilers, engine tenders and appurtenances are to be kept in proper condition. Nor are such matters to be left to the varying and uncertain opinions and verdicts of juries. The interests of the carriers will best be served by having and keeping their locomotive boilers safe; and it may well be left to their officers and engineers to decide the engineering questions involved in determining whether to use fusible plugs or other means to that end." (Italics ours)

If the act gave the Commission power to prescribe how the boilers should be kept safe or the things that would be required for that purpose how could it be said that the carriers were left free to so determine?

The firedoor is an integral portion of the boiler as is a fusible plug, and in discussing the latter with reference to the safety of the boiler this Court said:

> "It may well be left to their (the carriers') officers and engineers to decide the engineering questions involved in determining whether to use fusible plugs or other means to that end."

If the original Boiler Inspection Act did not prescribe those things which were necessary to keep the boilers in proper condition for use without unnecessary danger, nor give the Commission power to so prescribe, but left the carriers free to decide the engineering questions involved, certainly the amendment of March 4, 1915, made no change with reference to the boilers and merely extended the operation of the original act to "apply to and include the entire locomotive and tender and all parts and appurtenances thereof." That is the language of Section 1 of the amendment and Section 3 specifically provides:

> "That nothing in this act shall be held to alter, amend, change, repeal or modify any other act of Congress than the said act of February seventeenth, nineteen hundred and eleven, to which reference is

herein specifically made, or any order of the Interstate Commerce Commission promulgated under the safety appliance act of March second, eighteen hundred and ninety-three, and supplemental acts."

This act as amended was also under consideration by this Court in the case of *Vandalia Railroad Company vs. Public Service Commission*, 242 U. S. 255, 61 L. ed. 276. This is the *Indiana Headlight Law Case* and this Court held that it was not necessary to decide whether or not the amendment of 1915 authorizes the Interstate Commerce Commission to prescribe any particular type of headlight, or other appliance. The court did not decide that question but appears to cast a serious on such authority. We call attention to this careful and significant language, page 259:

> "The amendment of 1915 extends the provisions *respecting inspection*, etc., to the entire locomotive and its appurtenances."

This appears to be a clear indication that the original act was confined to "inspections" and that the amendment merely extended it in that respect.

WHERE THE BODY OF A STATUTE IS FREE FROM AMBIGUITY IT CANNOT BE MODIFIED OR ENLARGED BY RESORT TO THE TITLE.

From the opinion of the learned court below it would appear that the title of the Act of 1911 was relied upon to determine the purpose of the Act, which purpose was not enlarged or extended by any of the amendments but only to extend its field of operation to cover the locomotive, tender and their parts as well as the boiler. In its opinion (R. 17) the court said:

> "The title of the Act of 1911 states that its purpose was to 'Compel common carriers engaged in interstate commerce to equip their locomotives with safe

and suitable boilers and appurtenances thereto,' not simply to inspect and keep in order such boilers and appurtenances as they had."

The court grounded its decision on the compulsion mentioned in the title although nothing whatever is said in the body of the Act, or in any of the amendments, giving power to any body or person to compel the use of any equipment. We submit that the purpose of the Act as contained and set forth in the body thereof cannot be enlarged by reference to the title, and where the body of the statute is free from ambiguity the meaning expressed therein must be given effect without resort to the title.

This subject was fully discussed and the rule laid down by this Court in the case of *Caminetti vs. United States*, 242 U. S. 470, 61 L. ed. 442. In that case, after citing many authorities, this Court said, page 490:

> "But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent."

Makenzie vs. Hare, 239 U. S. 299, 308; 60 L. ed. 297, 300;

Lapina vs. Williams, 232 U. S. 78, 92; 58 L. ed. 515, 520.

In the case at bar the language of the original statute and the amendments are plain and unambiguous. They deal solely with inspection and nowhere is any reference made, directly or indirectly, to compelling carriers to equip their locomotives with appliances of any kind.

On this subject of the authority given to the Interstate Commerce Commission by the Boiler Inspection Act and the amendments thereto, we feel we should bring to the notice of this Court the diametrically contradictory attitude of the carriers, including the appellee, when before the Commission discussing its authority and before the court challenging a state statute. Section 5 of the original act required each carrier, within three months, to file with the chief inspector its rules and instructions for the inspection of locomotive boilers. After hearing and approval by the Commission, such rules and instructions, with any modifications required by the commission, are made obligatory upon the carriers. In the event any carrier failed to file its rules and instructions, the chief inspector was empowered to prepare rules and instructions which, after approval by the Commission and service on the carrier were made obligatory upon the latter. By the amendment of 1915 these provisions were made to apply to the entire locomotive, the tender and all their parts and appurtenances.

To secure uniformity, conferences were held to consider rules at which one hundred and fifty-six railroad companies, including the appellee, with a mileage of 215,000 miles, were represented by a special committee. Substantial agreements were arrived at in conference with the chief Inspector on proposed rules with the exception of rules requiring headlights and automatic bell ringers. These were referred to the Interstate Commerce Commission and hearings held. In these hearings the carriers were represented by eminent counsel. In the discussion of a proposed rule to require locomotives to be equipped with automotic bell ringers, counsel for the carriers, including appellee, is reported on pages 61 and 62 of the official stenographers minutes to have said:

"Our view of the law with respect to the bell ringer is precisely the same as our view as to the head lights; that, as long as there are state statutes, as long as there are ordinances of cities and villages requiring bells to be rung, there must be a bell and the bell must be rung. But, sirs, we say that how that bell should be rung and in what way it should be rung is not a matter for the bureau of boiler inspection to prescribe and that the law does not contain authority to them to prescribe how that should be done."

"And we say that that should be left to the railroad companies and further than that, perhaps to the municipalities through which the railroad companies run."

If the Bureau of Inspection may not prescribe *how* a bell should be rung, can it prescribe how a firedoor shall be operated? If it may be left to a municipality to prescribe, why not to a state?

Subsequent to the hearings, a brief was filed on behalf of the special committee of the railroads. In the statement of the case and on page 8 of their brief, it is stated:

"The carrier also raised the point of law that the Boiler Inspection Act of 1911, as amended by the Act of March 4, 1915, did not confer upon the Bureau of Locomotive Boiler Inspection or upon Interstate Commerce Commission power to prescribe any particular kind, type or design of a locomotive or its appurtenances or any of them."

On page 76 of their brief they state and discuss the following proposition of law:

"The Boiler Inspection Act of nineteen hundred and eleven, as amended by the Act of March 4, 1915, imposed no duty and confers no authority upon the Interstate Commerce Commission other than to approve or to modify rules for the inspection of locomotives and their appurtenances."

In the discussion of this proposition, the following is stated on behalf of the carriers, including the appellee, on page 79 of the brief:

> "There is nowhere in the Act of 1911 or in the Act of 1915 either a requirement or even a permission, direct or indirect, to the Bureau of Locomotive Boiler Inspection, or to any other body or person, to require a particular kind of construction or a particular type of equipment."

It is manifestly impossible for the carriers, including appellee, to be correct in both instances. Admittedly the Congress has passed no law on the subject of firedoors. They contend to the Commission that neither the act of 1911 nor the amendment of 1915 contains either a requirement or even a permission, direct or indirect, to any body or person whatsoever to require a particular kind of construction or type of equipment. Without subscribing to this all embracing contention, we submit that to now hold that the states are without authority to regulate firedoors is to say that there are instrumentalities of interstate commerce not subject to regulation unless and until Congress has acted directly thereon. This would be contrary to all the authorities.

POWERS NOT EXPRESSLY GIVEN CANNOT BE IMPLIED.

There are certain fundamental principles regarding the respective powers of Congress and the states relating to the regulation of interstate commerce so well settled as to have become almost axiomatic and need neither argument nor citation of authorities. The mere grant of power to Congress does not exclude the states. The exercise of the power by Congress, however, is paramount, to the exclusion of the states, and any and all state statutes in

conflict with the federal regulations are rendered inoperative and void. Federal statutes, however, are strictly construed and state regulations are valid unless they are repugnant to or in conflict with the federal regulations or Congress has clearly manifested an intention to fully occupy the field. The rule is given in both positive and negative form in *Atlantic Coast Line R. R. Co. vs. Georgia,* 234 U. S. 280, 58 L. ed. 1312. This Court by Mr. Justice Hughes said at page 292:

> "If there is a conflict in such local regulations, by which interstate commerce may be inconvenienced,—if there appears to be need of standardization of safety appliances, and of providing rules of operation which will govern the entire interstate road, irrespective of state boundaries,—there is a simple remedy; and it cannot be assumed that it will not be readily applied if there be real occasion for it. *That remedy does not rest in a denial to the state, in the absence of conflicting Federal action, of its power to protect life and property within its borders,* but it does lie in exercise of the paramount authority of Congress, in its control of interstate commerce, to establish such regulations as, in its judgment, may be deemed appropriate and sufficient. Congress, when it pleases, may give the rule and make the standard to be observed on the interstate highway."

This Court passed upon the powers given the Commission in the case of *B. and O. Rd. Co. vs. Groeger, supra,* and held that the carriers are left free to determine the means to be used in complying with their duties under the act.

Another reference to the powers given to the Interstate Commerce Commission, by virtue of the Federal Boiler Inspection Act, and its amendments, is the negative statement contained in the opinion in the *Indiana Headlight Law Case, Vandalia Railroad Company vs. Public Ser-*

vice Commission, 242 U. S. 255, 61 L. ed. 276, decided December 11, 1916. It will be noted that the opinion in this case was announced subsequent to the amendment of 1915 extending the original act, so as to comprise the locomotive, tender and all their parts and appurtenances.

While it was not necessary in the determination of this case, the question was involved as to whether or not the amendment gave the Commission authority to prescribe any particular type of headlight. In discussing the amendment this Court said (page 259):

> "The amendment of 1915 extends the provisions *respecting inspections*, etc., to the entire locomotive and all its appurtenances. Whether those provisions authorize the Interstate Commerce Commission to prescribe any particular type of headlight, or other appliance, is a question upon which we need not now pass, for the reason that the decision of the Supreme Court of Indiana, refusing an injunction to restrain the enforcement of the State Commission's order, was rendered and judgment thereon entered before the passage by Congress of the act referred to." (Italics ours)

It is our contention that the federal act is an "Inspection" law, and in the case last noted this Court carefully points out that the amendment of 1915 extends the "provisions respecting inspections etc." In the *Georgia Headlight Law Case*, 234 U. S. 280, *supra*, which was prior to the amendment of 1915, this Court held that a Georgia statute, providing for a specified headlight, was not in conflict with the original law, as that related to boilers. The Court said page 294:

> "The intent to supersede the exercise of the state's police power with respect to this subject cannot be inferred from the restricted action which thus far has been taken."

In the case of *United States vs. Pennsylvania Railway Company*, 242 U. S., 208, in discussing the power of the Interstate Commerce Commission to order the carriers to provide or furnish tank cars, the court quoted with approval the following language, page 221:

> "A power so extraordinary and so vital reached by construction could not justly rest upon any less foundation than that of direct expression or necessary implication, and we can find neither of these in the statute."

Again in the case of *I. C. C. vs. Cinn. N. O. & T. P. Ry. Co.*, 167 U. S., 479, in discussing the power of the Commission to fix rates under the first act to regulate commerce the court by Mr. Justice Brewer at page 494 said:

> "The grant of such power is never to be implied."

The Georgia automatic fire door law requires the installation of certain specified equipment. The court below holds this is in violation of the Federal law as the Interstate Commerce Commission under the Federal boiler inspection act has exclusive jurisdiction of this matter. This means, that if deemed necessary or advisable, the Commission exclusively could order the installation of such equipment. This is merely an inferred or implied power in the commission and we have shown that the carriers themselves would be the very last to concede—and deny—that the boiler inspection law clothes the Interstate Commerce Commission with any power to order the installation of any equipment of any character for any purpose, and such tremendous power is not to be implied or inferred.

THE LIMITED FIELD OF REGULATION OCCUPIED BY CONGRESS CANNOT BE CONSTRUED INTO AN INTENTION TO ENTIRELY OCCUPY THE FIELD TO THE EXCLUSION OF THE STATES.

This doctrine has been repeatedly announced and confirmed by many decisions of this Court. The rule is very clear, and unless Congress has plainly manifested its intention to occupy the whole field to the exclusion of the states, and the state statute is so repugnant to the Federal statute that they both cannot operate together, the state power of regulation is not ousted.

The problem in each case is stated in *Roberts Federal Liabilities of Carriers,* Vol. 1, Sec. 17, where the author says (page 57):

> "While the principle that congressional action over interstate commerce renders state laws occupying the same field or dealing with the same subject matter inoperative, has been unquestionably established and repeatedly applied, the greatest difficulty in the practical administration of the law is to determine the exact boundary of the field or the extent of the subject matter covered. *If the state and the national law do not apply to the same subject matter, both are valid.* If they cover the same field or subject matter, the state law must give way." (Italics ours)

The question in the case at bar is, "what is the subject matter covered by the Boiler Inspection Act and its amendments?" We contend that it is to promote safety in operation by requiring adequate inspections.

There is no evidence in this case and nothing in the Georgia statute indicating that the purpose of the automatic firedoor provided for is to promote safety in operation. It is claimed that on the happening of certain contingencies it tends to increase the safety of the engineer and firemen in the cab, and may incidentally affect and

increase safety in operation, but the real purpose is for the protection, health, comfort, convenience and general welfare of those engaged in firing and driving the locomotives. We submit this is a field of regulation untouched by the federal safety statute, and unless the state requirement is in actual conflict with or repugnant to the federal regulation, the state requirement is valid.

In the case of *Missouri K. T. R. Company vs. Harris*, 234 U. S., 412, 58 L. Ed., 1377, this Court by Mr. Justice Pitney at page 417, said:

> "But it is equally well settled that the mere creation of the Interstate Commerce Commission, and the grant to it of a measure of control over interstate commerce, does not of itself, and in the absence of specific action by the Commission or by Congress itself, interfere with the authority of the states to establish regulations conducive to the *welfare* and *convenience* of their citizens, even though interstate commerce be thereby incidentally affected, so long as it be not directly burdened or interfered with." (Italics ours)

Missouri P. R. Co. vs. Larabee Flour Mills Co., 211 U. S., 612, 623; 53 L. Ed., 352, 361; 29 Sup. Ct. Rep. 214;

Southern R. Co. vs. Reid, 222 U. S., 424, 437; 56 L. Ed., 257, 260; 32 Sup. Ct. Rep., 140.

In this case, a statute of the State of Texas, allowing an attorney's fee for collection of a claim against a railroad was challenged as unconstitutional in the light of the Carmack amendment. This amendment covers the specific subject matter of the liability of a carrier for loss or damage to property. The state statute expressed an added liability in the nature of costs by providing that the carrier would be liable for an attorney fee. We submit that in that case, the state statute was more in the field of regu-

lation covered by the Carmack amendment than is the Georgia statute in the field covered by the Federal Boiler Inspection Act in the instant case.

This Court, however, held the Texas statute to be constitutional and not repugnant to Federal legislation. The Court said (page 418):

> "These cases recognize the established rule that a state law enacted under any of the reserved powers —especially if under the police power—is not to be set aside as inconsistent with an act of Congress, unless there is actual repugnancy, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject. The rule rests upon fundamental grounds that should not be disregarded. In *Reid v. Colorado*, 187 U. S. 137, 148, 47 L. ed. 108, 114, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506, the court, speaking by Mr. Justice Harlan, said: 'It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested. This court has said—and the principle has been often reaffirmed—that 'in the application of this principle of supremacy of an act of Congress in a case where the state law is but the exercise of a reserved power, the *repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together.*" *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. ed. 243, 247.' In *Savage v. Jones*, 225 U. S. 501, 533, 56 L. ed. 1182, 1194, 32 Sup. Ct. Rep. 715, the court said 'When the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course, be considered, and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished,—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect,—the state law must yield to the regu-

lation of Congress within the sphere of its delegated power (citing cases). But the intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. *In other words, such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state.*'" (Citing many cases.) (Italics ours)

In *Lake Shore and Michigan Southern Ry. vs. State of Ohio*, 173 U. S. 285, 43 L. ed. 702, the third proposition of the syllabus states:

> "The power of the state by appropriate legislation to provide for the public convenience stands upon the same grounds as its power by appropriate legislation to protect the public health, the public morals or the public safety."

This is a clear statement that the instrumentalities of commerce may be regulated in several aspects, and if the Federal power has been exercised in regard to one aspect, the states have power to regulate in the others so long as there is no *actual repugnance*.

THE REGULATIONS MADE BY CONGRESS ARE LIMITED TO THE FIELD OF SAFETY. THE AUTOMATIC FIREDOOR REQUIRED BY THE GEORGIA STATUTE IS NOT PRIMARILY INTENDED TO PROMOTE SAFETY AND IS SUBJECT TO STATE REGULATION.

If the Interstate Commerce Commission has any authority by virtue of the powers delegated to it by the Federal Boiler Inspection Law, to require the use of any specific equipment, it can only require such as is necessary to carry out the purpose of the Act, namely, safety in operation. The Act will be strictly construed and, as here-

tofore pointed out, the railroads of the country, including appellee, have argued before the commission that it has no power to prescribe any particular kind, type or design of a locomotive or its appurtenances or *any* of them. In *Baltimore and O. R. Co. vs. Groeger, supra,* this Court held that under this law the railroad is bound absolutely to furnish what before, under the common law, it was its duty to exercise ordinary care to provide. The Court also held, however, that "the things required for that purpose were not prescribed or changed by the Act" and further "that it may well be left to the engineers and officers of the railroads to decide the means to that end." The law neither prescribed the means nor did it delegate the power to so prescribe.

The court below (R. 16) refers to the fact that the Chief Inspector, in compliance with his duties imposed by the law, has in several of his annual reports reported the desirability of automatic firedoors, such as are required by the Georgia Statute, but that the commission has not required a rule of inspection providing for the same. We submit that the commission does not consider automatic firedoors *essential* to safety in operation and that it is therefore without power to require such a rule.

The view of the commission of the nature and purpose of this device is revealed in a recent report of investigation of boiler explosion on Pennsylvania engine No. 64 near Summit, Ohio on Nov. 23, 1925. This report is made jointly by inspectors for the Interstate Commerce Commission and the Public Utilities Commission of Ohio. This report shows that the locomotive had a swinging type firedoor and the latch was badly worn. The report states:

> "The result of the explosion in the firebox when the crownsheet blew down had a distressing effect in the cab when the force of explosion blew the swinging

firedoor open, permitting the full pressure of steam to escape into cab making it a veritable death trap and taking the lives of three men.

We believe if this locomotive had been equipped with an automatic firedoor as provided by law, there would not have been even slight injury sustained by the men as the purpose of the automatic door is to *protect* the men in the cab under just such circumstances that occurred in this case."

This is a clear statement of the view of the commission of the purpose of the firedoor required by an Ohio statute which is almost identical with the Georgia statute. The report of investigation of this particular explosion is also significant in this, that the train coasted a distance of 6900 feet before coming to a stop. No other damage was done to the train and it "operated safely" for over a mile before coming to a stop. The automatic firedoor would not have prevented nor tended to prevent the explosion, nor could it have affected the safety of the train after the explosion. The automatic firedoor could not have blown open, as did the swinging door, and it would have protected the employees in the cab. Such automatic firedoor might incidentally affect the safety of the train, after such an explosion, in that, the employees being safe, they might be able to bring the train under control. This however, is both problematical and incidental as the explosion might well wreck the controlling mechanism. A prime purpose of the automatic firedoor, expressed by the inspectors for the Interstate Commerce Commission is the protection of the employees in the event of an explosion in the firebox.

The same purpose is stated in the evidence in the case at bar. (R. 20.) In addition to the foregoing it is stated that the automatic firedoor conserves the health of the fireman by protecting him from exposure to extremes of heat and cold while performing his duties, also conserves his

eyesight by reducing the amount and extent of exposure to the glare of the fire.

We have heretofore shown that the Federal Boiler Inspection Act covers and is limited to the field of inspection to promote safety in operation, and submit that this does not occupy the entire field of regulation nor enter the field touching the health, convenience or general welfare of the employees.

This is also the view taken by the Supreme Court of the State of Wisconsin in some recent cases decided Nov. 17, 1925 involving the constitutionality of a somewhat similar statute of that state. *Chicago and Northwestern Railway Company vs. Railroad Commission of Wisconsin,* 205 N. W. 932. The statute of the State of Wisconsin prohibits the use of locomotives within certain dates, unless equipped with cab curtains. This statute was challenged by the railroads as imposing an undue burden on interstate commerce and as conflicting with Federal legislation and rules of the Interstate Commerce Commission.

In its decision the Supreme Court of Wisconsin points out that the law was enacted for the purpose of promoting the public health and comfort; that, as such it is a police regulation and within the powers of the state and that, but for the fact that the legislation touches an instrumentality of interstate commerce, the power of the state could not be questioned. The court then discusses the Federal Boiler Act and points out that it is a safety Act, pure and simple. Section 2 requires locomotives to be "safe to operate." The purpose of the Act is to promote the "safety" of the public and employees. The court then says:

> "The power of Congress to promote safety in the prosecution of interstate commerce is one subject of legislation. The power of the state to promote the health and welfare of its citizens is quite another. By the exercise of the first power the states do not lose

the second, and the legislation of each jurisdiction will stand unless they be repugnant to each other."

This is the contention of the appellant herein and we submit that if the Interstate Commerce Commission should, by virtue of the Boiler Inspection Act, undertake to require by rule anything intended primarily to promote the health, welfare or convenience of the employees, such attempted exercise of power by the Commission would immediately be challenged. In view of the cold in the north we suggest a rule requiring enclosed vestibule cabs equipped with a radiator and in view of desert conditions a rule requiring fans and drinking water in the cab.

THE STATE OF GEORGIA MAY PROTECT THE TRAVELLERS UPON ITS HIGHWAYS AND THE STATUTE REQUIRING AUTOMATIC FIREDOORS HAS A REASONABLE RELATIONSHIP TO THAT END.

The effect on the vision of the fireman by working in the glare of the fire with the old type swinging doors has been referred to, viz:—that for the time being he is practically blinded. A lookout must be maintained at all times for persons or vehicles approaching at railroad crossings and it is obvious that this is as essential on the fireman's side of the locomotive as the engineer's. It is physically impossible for the engineer to watch both sides. As a matter of fact, the rules require the fireman to keep a lookout on his side.

The right of the states to protect travellers on its highways has been repeatedly upheld by this Court. This principle was discussed by this Court in the case of *Erie R. R. Co. vs. Public Utility Commissioners*, 254 U. S. 394, 410; 65 L. ed. 322, 333. In that case the Board of Commissioners of the State of New Jersey had made an order requiring a change of grade at a number of street cross-

ings. The order was assailed as an interference with interstate commerce and in violation of the commerce clause of the constitution. In upholding the order this Court said, page 410:—

> "Grade crossings call for a necessary adjustment of two conflicting interests,—that of the public using the streets, and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the state, in the care of which this interest is, and from which, ultimately, the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power; or, to put the same proposition in another form, the authority of the railroads to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires."

Again, in the case of *Erb vs. Morash*, 177 U. S. 584, 587; 44 L. ed. 897, 898, in upholding an ordinance of Kansas City limiting the speed of trains within its limits to six miles per hour this Court said, page 587:

> "A city when authorized by the legislature may regulate the speed of railroad trains within the city limits * * *. Such act is, even as to interstate trains, one only indirectly affecting interstate commerce and is within the power of the state until at least Congress shall take action on the matter."

And in *Crutcher vs. Kentucky*, 141 U. S. 47, 61; 35 L. ed. 649, 653, this Court said, page 61:

> "It is also within the undoubted province of the State Legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce. Such regulations are eminently local in their character, and, in the absence of congressional regulations over the same subject, are free from all constitutional objections, and unquestionably valid."

THE STATUTE OF THE STATE OF GEORGIA IS A VALID EXERCISE OF THE RESERVED POLICE POWER AND IS NOT A REGULATION OF COMMERCE.

The court below held (R. page 16) that:

> "The state statute here in question concerning itself solely with the locomotives of railroad companies, seems more clearly a regulation of commerce than a police regulation for the good of the general public."

This view of the statute appears to have materially influenced the decision of the learned court below and we respectfully submit it is not in accordancee with the holdings of this Court. By an unbroken line of decisions this Court has held that such requirements by state statutes are a valid exercise of the reserved police power of the states and are not *per se* regulation of interstate commerce even though they indirectly and incidentally affect it. To be repugnant to the commerce clause of the constitution the state statute must impose a direct burden on and interference with interstate commerce.

This question is almost invariably raised in a challenge of a state statute of this character. It was discussed by this Court and the rule stated in *Atlantic C. L. Ry. Co. vs. Georgia,* 234 U. S. 280, 58 L. ed. 1312. In holding that the headlight law of Georgia was not a regulation of interstate commerce this Court said pg. 291:

> "In thus deciding, the court applied the settled principle that, in the absence of legislation by Congress, the states are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce. That has been the law since the beginning of railroad transportation. It was not intended that, pending Federal action, the use of such agencies, which, unless carefully guarded, was fraught with danger to the community, should go unregulated, and that the states should be without authority to secure needed local protection. The requirements of a state, of course, must not be arbitrary, or pass beyond the limits of a fair judgment as to what the exigency demands, but they are not invalid because another state, in the exercise of a similar power, may not impose the same regulation. We may repeat what was said in *Smith v. Alabama,* 124 U. S. 465, 481, 482, 31 L. ed. 508, 513, 514, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564: 'It is to be remembered that railroads are not natural highways of trade and commerce. * * * The places where they may be located, and the plans according to which they must be constructed, are prescribed by the legislation of the state. Their operation requires the use of instruments and agencies attended with special risks and dangers, the proper management of which involves peculiar knowledge, training, skill, and care. The safety of the public in person and property demands the use of specific guards and precautions. * * * The rules prescribed for their construction and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the limits of the local

law. They are not *per se* regulations of commerce; it is only when they operate as such in the circumstances of their application, and conflict with the expressed or presumed will of Congress exerted on the same subject, that they can be required to give way to the supreme authority of the Constitution.'

Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28;

Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086;

New York, N. H. & H. R. Co. v. New York, supra;

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465;

Missouri P. R. Co. v. Larabee Flour Mills Co., 211 U. S. 612, 53 L. ed. 352, 29 Sup. Ct. Rep. 214;

Missouri P. R. Co. v. Kansas, 216 U. S. 262, 54 L. ed. 472, 30 Sup. Ct. Rep. 330;

Chicago, R. I. & P. R. Co. v. Arkansas, 219 U. S. 453, 55 L. ed. 290, 31 Sup. Ct. Rep. 275;

Minnesota Rate Cases (Simpson v. Shepard), 230 U. S. 352, 402, 410, 57 L. ed. 1511, 1542, 1546, 48 L. R. A. (N. S.) 1151, 33 Sup. Ct. Rep. 729."

In the case at bar neither the Congress of the United States nor the Interstate Commerce Commission has made any rule or regulation on the subject of firedoors. As a matter of fact, the commission has failed or refused to make any regulation in spite of the repeated recommendations of the Chief Inspector. As stated by Mr. Justice Hughes in the *Georgia Headlight* case, *supra*, the remedy is simple—it does not rest in a denial to the state of its power to protect life and property within its borders, but it does lie in the exercise of the paramount authority of Congress.

The same question is briefly discussed and quickly disposed of in *Vandalia R. Co. vs. Public Service Commission*,

242 U. S. 255, 61 L. ed. 276. In that case this Court said by Mr. Justice Pitney at page 258:

> "So far as the attack upon the Act of 1909 and the order made pursuant to it is based upon interference with interstate commerce, it very properly is conceded that, but for a recent act of Congress, the case would be controlled by *Atlantic Coast Line R. Co. v. Georgia*, 234 U. S. 280, 290, 58 L. ed. 1312, 1317, 34 Sup. Ct. Rep. 829, (259) where it was held that, in the absence of Federal legislation, the states are at liberty in the exercise of their police power, to establish regulations for securing safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce; and that the Safety Appliance Acts of Congress, since they provided no regulations for locomotive headlights, showed no intent to supersede the exercise of state power with respect to this subject."

CONGRESS HAS DEFINITELY RESERVED TO ITSELF ALL POWER TO ORDER EQUIPMENT OF ANY KIND.

Under the original act to regulate commerce, the Interstate Commerce Commission held it was without power to order carriers to furnish equipment. Under the amendment to that act, the Commission undertook to order a carrier to furnish specified equipment. This order was set aside by this Court in *United States vs. Penn. Ry.*, 242 U. S., 208, *supra*. The Court pointed out that the carriers "are left free to exercise their own judgment in the matter of equipment." In the rate case, *I. C. C. vs. Cinn. N. O. and T. P. Ry. Co.*, 167 U. S. 479, *supra*, it was held that such powers are never implied.

We have been unable to find any instance in which the Commission, under its general powers, has ordered the carriers to install or use any specific equipment not already

in general use. Whenever under its rules for inspection it is provided that the locomotive shall have any specified item, such item was being generally used.

In the *Georgia Headlight Law* case, 234 U. S. 280, *supra*, in which this Court held that the original Boiler Inspection Act did not cover headlights, nor oust the states of their power to regulate with regard to the same, the various acts of Congress requiring equipment were referred to, page 293:

> The act of March 2, 1893, chap. 196 (27 Stat. at L. 531, U. S. Comp. Stat. 1901, p. 3174), relating to power driving-wheel brakes for locomotives, grab irons, automatic couplers, and height of drawbars; the act of March 2, 1903, chap. 976 (32 Stat. at L. 943, U. S. Comp. Stat. Supp. 1911, p. 1314), amending the act of 1893; the act of May 27, 1908, chap. 200 (35 Stat. at L. 324, 325, U. S. Comp. Stat. Supp. 1911, p. 1325) authorizing the Interstate Commerce Commission to keep informed regarding compliance with the safety-appliance act, and to investigate and report on the need of any appliances or systems intended to promote the safety of railway operations; the act of May 30, 1908, chap. 225 (35 Stat. at L. 476, U. S. Comp. Stat. Supp. 1911, p. 1326), relating to locomotive ash pans; the act of April 14, 1910, chap. 160 (36 Stat. at L. 298, U. S. Comp. Stat. Supp. 1911, p. 1327), relating to sill steps, hand brakes, ladders, running boards, and hand holds, and providing that the Interstate Commerce Commission should, after hearing, designate the number, dimensions, location, and manner of application of these appliances, and of those required by the act of 1893; the detailed regulations prescribed by the Commission, on March 13, 1911, pursuant to this authority; the act of May 6, 1910, chap. 208 (36 Stat. at L. 350, U. S. Comp. Stat. Supp. 1911, p. 1329), requiring the Commission to investigate accidents and make reports as to their causes, with such recommendations as they may deem proper; and the act of February 17, 1911, chap. 103 (36 Stat. at L. 913, U. S. Comp.

Stat. Supp. 1911, p. 1333), relating to locomotive boilers.

The Court then said:

> But it is manifest that none of these acts provides regulations for locomotive headlights. Attention is also called to the investigations conducted by what is known as the "block signal and train control board" (organized by the Commission), and the reports of that board with respect to sundry devices and appliances, including headlights. It does not appear, however, either that Congress has acted, or that the Commission, under the authority of Congress, has established any regulation so far as headlights are concerned. As to these, the situation has not been altered by any exertion of Federal power, and the case stands as it has always stood, without regulation, unless it be supplied by local authority.

None of the above mentioned Acts refers to firedoors. Neither Congress nor the Commission under the authority of Congress, has established any regulation so far as firedoors are concerned, and as stated in the above case, firedoors stand as they have always stood, without regulation, unless it be supplied by local authority.

With reference to the holding of the court below that the field is fully occupied we wish to call attention to Section 26 of the so-called Transportation Act of 1920, 41 Stat. L., 498, U. S. Comp. Stat. Supp. 1923, Sec. 8596 b, page 574. Congress here gives the Commission definite authority to order the carriers to install automatic train stop or train control devices. This is directed to the safety in operation of the train and locomotive and is years after the amendment of 1915 to the original Boiler Inspection Act.

If by virtue of the amendment of 1915 Congress had fully occupied the field of regulation with regard to locomotives why was it necessary to pass any law on the subject

in 1920, and *a fortiori,* if the said amendment gave the commission general power to order equipment why did Congress enact another law solely for the purpose of giving the commission authority to order the installation of specific equipment?

We submit that under well settled rules of construction, this action of Congress demonstrates beyond question that all prior acts cover a limited field, and that it had not up to that time delegated to the Commission any general power to order the carriers to furnish or use equipment of any kind.

IN THE ABSENCE OF THE EXERCISE OF THE POWER TO REGULATE BY CONGRESS SUCH POWER IS RESERVED TO AND MAY BE EXERCISED BY THE STATES.

It is conceded that the Congress of the United States has paramount power to regulate interstate commerce, but the doctrine that in the absence of legislation by Congress the states are not denied the exercise of their power to regulate railroad equipment and operation within their territory has been settled beyond dispute by this Court. The mere grant of power to Congress is not alone sufficient to deprive the states of that power. On this proposition we deem it sufficient to quote the language of Mr. Justice Hughes in *Atlantic Coast Line R. R. vs. Georgia,* 234 U. S., 280. At page 291, he said:

> "In thus deciding the court applied the settled principle that, in the absence of legislation by Congress the states are not denied the exercise of their power to secure safety in the physical operation of railroad trains within their territory, even though such trains are used in interstate commerce. That has been the law since the beginning of railroad transportation. It was not intended that, pending Federal

action, the use of such agencies, which unless carefully guarded, was fraught with danger to the community, should go unregulated, and that the states should be without authority to procure needed local protection."

From the foregoing, we submit that unless the Congress of the United States or the Interstate Commerce Commission, acting under authority of Congress, has made and established regulations with reference to "fire-doors," the State of Georgia is not ousted of authority to do so, and as this has not been done the state statute is not in that respect in violation of any law of the United States.

Vandalia Ry. Co. vs. Public Service Comm., 242 U. S. 255; 61 L. ed. 276.

CONCLUSION.

We therefore respectfully submit that the subject matter covered by the statute of the State of Georgia in controversy is susceptible of regulation by the State of Georgia under its police powers or by the Congress of the United States under the commerce clause of the constitution;

That the exercise of this power by the Congress of the United States would be paramount, would exclude the states from regulation and would invalidate any existing state laws covering the same subject matter;

That the Georgia statute requiring the installation of specific equipment is a police regulation and only incidentally interferes with interstate commerce, and that under the decisions of this Court such a regulation is not *per se* a regulation of interstate commerce, but is valid unless in conflict with or repugnant to some law of Congress or regulation of the Interstate Commerce Commis-

sion passed or made by virtue of the commerce clause of the constitution;

That Congress has not passed any law affecting the subject of fire doors; that neither the Interstate Commerce Commission, nor any other body had made any rule or regulation affecting fire doors; that Congress has not occupied this field of regulation or manifested any intention to occupy the field; that Congress has not delegated to the Interstate Commerce Commission or any other body, power to order equipment of this kind or character; and that the Interstate Commerce Commission has plainly indicated its view that it is without power to order automatic fire doors, by failing to carry out the recommendations made by the chief boiler inspector in accordance with law in his several annual reports.

That the court below erred in holding the Act of the Legislature of the State of Georgia to be unconstitutional and invalid and in decreeing that the appellant be enjoined from applying the said act and that said finding and decree should be reversed.

Respectfully submitted,

GEORGE M. NAPIER,
Attorney General of the State of Georgia.

Of Counsel:

THOS. STEVENSON,
OSCAR J. HORN,
Cleveland, Ohio.

In the Supreme Court of the United States

October Term. 1925.

No. 386.

George M. Napier, Attorney General of the State of Georgia,

Appellant,

vs.

Atlantic Coast Line Railroad Company,

Appellee.

Appeal from the District Court of the United States for the Northern District of Georgia.

REPLY BRIEF OF APPELLANT.

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REPLY BRIEF OF APPELLANT.

ARGUMENT AND BRIEF OF AUTHORITIES.

The whole of the argument of the appellee is founded on two propositions,

(1) a legal conclusion that as Congress has regulated with reference to an instrumentality of interstate commerce the states are entirely excluded from making any regulations touching such instrumentality, and

(2) an assumption of fact that an automatic firedoor is a safety device and invades the specific field covered by the Federal legislation.

We submit that the statement of law is entirely too broad and contrary to repeated decisions of this Court and

that the assumption of fact is not well grounded, as an automatic firedoor is not primarily a device to promote "safety in operation" but is a protection to the enginemen.

In discussing the scope of the Boiler Inspection Act and its amendments appellee ignores the rule laid down by this Court in *Caminetti vs. United States*, 242 U. S. 470; 61 L. ed. 442,

> "that where the language of a statute is free from doubt it may not be added to or subtracted from by considerations drawn from titles or from any extraneous source, but is the sole evidence of the ultimate legislative intent."

To sustain their present contention that the acts give the Commission power to order equipment on locomotives used in interstate commerce they confuse the language of the title and of the enacting clause. While it is true that the title of the act has reference to "safe" boilers, the body of the act does not contain that expression but merely forbids the use of boilers unless "in proper condition and safe to operate in the service to which they are put." They freely state that the reference to the title is not an attempt to interpret an ambiguity in the body of the statute but to indicate that the body of the act realizes the purpose stated in the title. This is a reversal of the rule above quoted. The body of the act is conclusive as to its purpose, and if there is no power of compulsion therein, it cannot be read into it by resort to the title.

Although appellee contends that the commission has positive power to order equipment as well as negative power to forbid the use of unsafe equipment, they entirely ignore the decision of this Court in *Baltimore and O. R. Co. vs. Groeger*, 266 U. S. 521; 45 Sup. Ct. 169. In that case the Boiler Inspection Law was discussed and this Court by Mr. Justice Butler said, page 528:

"By the last mentioned section (section 2) defendant was bound absolutely to furnish what before, under the common law, it was its duty to exercise ordinary care to provide. The carriers were left free to determine how their boilers should be kept in proper condition for use without unnecessary danger. The things required for that purpose *were not prescribed or changed* by the act;" etc.

This Court further said, page 530:

"The act required a condition which would permit use of the locomotive without unnecessary danger. *It left to the carrier the choice of means to be employed to effect that result.* * * * The interests of the carriers will best be served by having and keeping their locomotive boilers safe; and it may well be left to their officers and engineers to decide the engineering questions involved in determining whether to use fusible plugs *or other means* to that end." (Italics ours)

Appellee argues that the Federal Statute requires a "safe" boiler. Not only free from physical defects and faulty materials, but "safe" in all particulars and equipped with all devices and appliances which *assure* its safety. Does appellee seriously contend that these statutes make a carrier an insurer of its locomotives and boilers?

Appellee also argues that to the interstate commerce commission is delegated the duty to determine what is necessary to make the boiler and locomotive "safe," and the power to order it. This contention is in direct opposition to the holding of this Court in the *Baltimore and O. R. Co.* case, *supra.*

We submit that the foregoing case sets at rest the question as to whether or not the commission has power to order the use of safety devices, and even if it were conceded that an automatic firedoor is a safety appliance, the commission has no power, by virtue of the Boiler Inspection Act or its amendments, to order its installation or use.

Appellee states that appellant recognizes that the Commission has *ordered* the installation of certain equipment. Appellee has misapprehended the brief of appellant as we are unable to find any language which can be construed as such an admission. We deny that the commission either possesses or has attempted to exercise any power to *order* equipment, but recognize that the rules *require* certain equipment as a standard of safety. At some length we argue that there is a vital distinction between the power to *order* and the power to *require* as such standard.

REGULATIONS OF CONGRESS NOT EXCLUSIVE.

The contention of appellee that merely because Congress has regulated interstate commerce by legislation concerning an instrumentality thereof, therefore the states are entirely excluded, will not bear careful examination.

The argument of appellee concedes that the Georgia statute is an attempted exercise of police power but in a field already entered or occupied by the paramount power of Congress. In support of that contention they rely on the recent decision of this Court in *Oregon-Washington R. R. and Nav. Co. vs. Washington*, 70 L. ed. 332. In that case, acting under a state statute, the Director of Agriculture of the State of Washington promulgated quarantine regulations, forbidding the importation from certain areas of alfalfa hay and meal except under named conditions. It was conceded that Congress had assumed control of the field and had given the Secretary of Agriculture full power to quarantine, though the secretary had not acted.

There is no analogy between that case and the case at bar. In that case, Congress had taken control of the specific subject matter by giving the Secretary of Agriculture full authority and responsibility to declare quarantines.

This was the precise field entered by the state statute. The fact that the Secretary of Agriculture had failed to act was of no moment, the federal act itself being a complete bar to the state. Only by holding that the Boiler Inspection Law, in the case at bar, gives the interstate commerce commission full power to prescribe what appurtenances and appliances shall be used to keep locomotives, boilers and tenders in proper condition and safe to operate, can the decision in the *Washington* case be made to apply. We submit that such a holding would be contrary to the holding of this Court in *Baltimore and O. R. Co. vs. Groeger, supra.*

Appellee states we contend that even if the commission did have power, under the act, to require automatic firedoors, it has not exercised it, and the field is left open till the commission has spoken. We are unable to find where we make any such contention, and admit that it would be contrary to the decisions of this Court. On the other hand, it is our contention that if the commission had power to *order safety appliances,* which this Court holds it has not, the Georgia statute is valid, as a firedoor is not a safety appliance.

EXCLUSIVE INTENTION MUST BE CLEARLY MANIFESTED BY CONGRESS.

Appellee contends that as the Georgia statute touches an instrumentality legislated upon by Congress, the same field is occupied, and there is no occasion to divide the subject matter. Only by conceding both propositions, (1) that the federal acts give the interstate commerce commission power to order safety equipment and (2) that an automatic firedoor is a safety appliance, can the Georgia statute be brought within the *subject matter* of the federal acts. The first proposition has been decided adversely by this Court and the second is not the fact.

Even if this Court should hold that the Boiler Inspection Law gives the Interstate Commerce Commission power to order safety appliances, which would be a reversal of the decision in the *Baltimore and Ohio R. Co.* case, *supra,* we earnestly contend it would not determine the instant case. An automatic firedoor is not a safety appliance but is a protective device. As pointed out in our original brief, its primary purpose is not to promote safety in operation, but it is a protection to the train crew *after* an accident has happened and also protects the health of the fireman and conserves his strength. It may incidentally promote safety after the emergency has arisen.

At this late day it cannot be maintained that even if Congress has fully occupied the field of regulation *as regards safety* of locomotives, therefore the states are entirely excluded from *all* regulation touching locomotives. This is to deny repeated decisions of this Court. In *Missouri K. & T. R. Company vs. Harris,* 234 U. S., 412, 58 L. Ed. 1377, this Court said, page 418:

> "These cases recognize the established rule that a state law enacted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an act of Congress, *unless there is actual repugnance, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject.* The rule rests upon fundamental grounds that should not be disregarded." (Italics ours)

In *Savage vs. Jones,* 225 U. S., 501, 533, 56 L. Ed., 1182, 1194, 32 Sup. Ct. Rep., 715, the Court said:

> "The intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other

words, *such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state.*" (Italics ours)

In support of their contention that Congress has manifested an intention to fully occupy the field appellee relies on *Oregon-Washington R. R. and Nav. Co. vs. Washington, supra; Northern Pacific Ry. Co. vs. Washington*, 222 U. S. 370; *Erie Railroad Co. vs. New York*, 233 U. S. 671, and the *Minnesota Rate Cases*, 230 U. S. 352. The first case is a quarantine case where Congress had occupied the field by giving authority to the Secretary of Agriculture to declare quarantines, the *Northern Pacific Ry. Co.* and *Erie Railroad Co.* cases both involve state statutes regulating Hours of Labor subsequent to the enactment of the federal Hours of Service Law. In each of these cases Congress had legislated directly on the specific subject matter and there is no analogy between those and the instant case.

The Boiler Inspection Act is what it is named—an inspection law. To bring the case at bar within the rule laid down in the cases last cited it becomes necessary to hold that this inspection law contains the implied power to order safety appliances—contrary to the holding in *Baltimore and O. R. Co. vs. Groeger, supra*—and to hold that an automatic firedoor is a safety appliance or intended to promote safety in operation for which there is no justification.

If the Boiler Inspection Law has the scope contended for by appellee it might be pertinent to inquire to what extent it will be carried. There are many state statutes and municipal ordinances regulating and interfering with locomotives used in interstate commerce. State statutes providing for full crews, examination of engineers, blowing whistles at crossings and the like, and ordinances with reference to smoke emitted by locomotives, regulating the

speed of trains, against unnecessary noises, for cutting trains at crossings and the like. Many of these statutes and ordinances affect the safety of trains and locomotives. Can it be said they are all invalid as invading the field occupied by Congress by the Boiler Inspection Law?

We submit that such a conclusion would lead to an absurdity. This Court is asked to hold, that in matters purely local in their nature, the states and municipalities are excluded from making any regulation that might remotely or indirectly affect the safety of locomotives. That as to all such matters, until Congress or the commission acts, a hiatus is created in which there is no regulation. A hiatus is as abhorrent to the law as is a vacuum to nature. All this on an implied power to which no reference is made in the body of the statute and contrary to the decision in *Baltimore and O. R. Co. vs. Groeger, supra.*

CONCLUSION.

We therefore respectfully submit that the Federal Boiler Inspection Law and its amendments simply cover the field of inspection to determine that locomotives used in interstate commerce are "in proper condition and safe to operate" in the service to which they may be put, and prohibiting their use till such condition is so determined.

That the Georgia statute, requiring an automatic firedoor is not an invasion of this field and is not in conflict with the exercise of any paramount power by Congress.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted] 87

GEORGE M. NAPIER, Attorney General of the State of Georgia,
Appellant,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR APPELLEE

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR APPELLEE

PART I

STATEMENT OF THE CASE.

The State of Georgia adopted an Act approved on the 13th day of August, 1924 (Georgia Laws, 1924, page 173), which is set out in full at page 9 of the record. The purpose of the Georgia law was to require "all steam railroad companies, operating steam locomotive engines on its railroad or railroads in

or through the State of Georgia, to provide and equip each and every steam locomotive so operated over its said road or roads in Georgia, with an automatic door to the fire box of such locomotive engine and to provide how the same shall be constructed and operated, and to provide a penalty against the company which fails to provide and maintain such automatic fire box doors in good condition."

There was exempted from the Act "locomotive engines weighing less than one hundred twenty-five thousand (125,000) pounds on the driver, or less than twenty-one (21) inch cylinders on logging or tram roads or mechanically fired engines."

The Atlantic Coast Line, which is an interstate carrier by railroad having considerable mileage in Georgia, filed its bill in the District Court of the United States for the Northern District of Georgia against the Attorney General of Georgia and against the prosecuting officers of the various jurisdictions along its line in Georgia, challenging the Georgia Act as being invalid and unconstitutional in that it offended against the commerce clause of the federal constitution. It contended that Congress had so occupied the field sought to be covered by the state Act as to render the statute unconstitutional as an interference with interstate commerce. In particular it insisted that jurisdiction of the subject had been taken by the Congress of the United States under the Act of February 17, 1911, and the two amendments thereto of March 4, 1915, and June 7, 1924.

The opinion of the District Court sustaining appellee is found on pages 15, 16 and 17 of the record. The opinion was followed by a judgment and decree declaring the Georgia Act invalid and enjoining the defendants named in the bill from applying or enforcing it.

THE QUESTION INVOLVED

The precise point to be determined is this:

Has Congress so taken jurisdiction over the subject of the locomotive and boiler of a carrier by railroad in interstate commerce as to deprive the state from enacting legislation requiring a carrier by railroad operating in interstate commerce within its borders to install an automatic door to the fire box of the locomotive?

THE APPLICABLE FEDERAL STATUTES

The pertinent Acts of Congress are as follows:

1. The Act of February 17, 1911, Ch. 103, 36 Stat. L. 913;
2. The Act of March 4, 1915, Ch. 169, 38 Stat. L. 1192, which is an amendment to the Acts of February 17, 1911; and
3. The Act of June 7, 1924, Ch. 355, 43 Stat. L. 659, which again amended the Act of February 17, 1911.

The caption of the Act of February 17, 1911, is:

> "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto."

The first section of this Act defines the carriers to which it is applicable.

The second section makes it unlawful, after the 1st day of July, 1911, for any common carrier, subject to the Act to use any locomotive engine propelled by steam power in moving interstate or foreign traffic, unless the boiler of said locomotive and the appurtenances thereof "are in proper condition and safe to operate in the service to which the same is put."

The third section provides for a chief inspector and certain assistants. They are required to make inspections and to "see

that the requirements of this Act and the rules, regulations and instructions made or given hereunder are observed by common carriers subject hereto."

The fourth section is administrative, dealing with the division of the country into inspection districts and dealing with the status of the inspectors.

Section five requires that each carrier subject to the Act shall file its rules or instructions for the inspection of locomotive boilers with the chief inspector, and that after hearing by the Interstate Commerce Commission, such rules and instructions with such modification as the Commission requires, shall become obligatory upon such carrier. If no such rules are filed, the chief inspector is required to prepare rules and instructions not inconsistent with the Act, and such rules and instructions, being approved by the Interstate Commerce Commission, and copy thereof being served upon the president, general manager or general superintendent of such carrier, shall be obligatory, and violation thereof shall be punished.

Section six of the Act requires that:

> "It shall be the duty of each inspector to become familiar, so far as practicable, with the condition of each locomotive boiler ordinarily housed or repaired in his district, and if any locomotive is ordinarily housed or repaired in two or more districts, then the chief inspector or an assistant shall make such division between inspectors as will avoid the necessity for duplication of work.
>
> "His first duty shall be to see that the carriers make inspections in accordance with the rules and regulations established or approved by the Interstate Commerce Commission, and that carriers repair the defects which such inspections disclose before the boiler or boilers or appurtenances pertaining thereto are again put in service."

Elaborate provision is made for carrying this power into effect.

Section seven requires annual reports to the Interstate Commerce Commission by the chief inspector, with recommendations.

Section eight requires reports of accidents.

Section nine provides a penalty upon any carrier for violating said Act or any rule or regulation made under its provisions or any lawful order of any inspector.

Section ten provides for an appropriation for carrying out the Act.

The Act of March 4, 1915, provides in Section 1 thereof that the Act of February 17, 1911, (designating such act by its date of approval and by its title or caption) "shall apply to and include the entire locomotive and tender and all parts and appurtenances thereof."

Section two provides:

> "That the chief inspector and the two assistant chief inspectors, together with all the district inspectors, appointed under the Act of February seventeenth, nineteen hundred and eleven, shall inspect and shall have the same powers and duties with respect to all the parts and appurtenances of the locomotive and tender that they now have with respect to the boiler of a locomotive and the appurtenances thereof, and the said Act of February seventeenth, nineteen hundred and eleven, shall apply to and include the entire locomotive and tender and all their parts with the same force and effect as it now applies to locomotive boilers and their appurtenances. That upon the passage of this Act all inspectors and applicants for the position of inspector shall be examined touching their qualifications and fitness with respect to the additional duties imposed by this Act."

By section two of the Act of June 7, 1924, Congress amended the second section of the Act of February 17, 1911, to read thus:

"Sec. 2. That it shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

PART II

THE ARGUMENT AND BRIEF OF AUTHORITIES

The constitutional right given to Congress to regulate commerce between the states is broad enough to include the right to regulate interstate commerce in all of its phases and aspects and extends to every instrumentality or agency by which it is carried on.

McCulloch vs. Maryland, 4 Wheat 316.

Smith vs. Alabama, 124 U. S. 465.

Congress has, therefore, by these three Acts, sought to regulate interstate commerce by legislation concerning an instrumentality thereof. The State of Georgia has likewise enacted legislation touching the same instrumentality. The same field is being occupied by both the national and the state governments, and it is manifest that the paramount authority of the former must prevail.

It must be clear that the determining factor involved is whether the Georgia statute and the Acts of Congress do in

fact occupy the same field. If that premise is assumed the well settled applicable doctrines announced many times by this court control the issue against the appellant. Let us, then, examine this controlling law as clarified by repeated decisions.

Obviously the Georgia statute under attack must find its sanction, if it finds any at all, in the power of the state to pass laws in the interest of the health, safety, morals and general welfare of its citizens, even though such laws affect, incidentally, interstate commerce. In other words, the act must be one enacted under the police power of the state. The statute cannot stand as a regulation of interstate commerce even in the absence of any action whatever by Congress, for this is a subject which by the commerce clause of the Constitution has been given to the federal government for exclusive regulation, and that delegation of power in and of itself necessarily excludes the states from direct control of the subject.

Minnesota Rate Cases, 230 U. S. 352.

Southern Ry. Co. vs. Reid, 222 U. S. 424.

But when Congress has acted to regulate commerce the state is silenced, even though the state law be a police measure conducive to the welfare or convenience of its citizens. Thus in:

Erie Railroad Co. vs. New York, 233 U. S. 671,

it was said:

> "Indeed, when Congress acts in such a way as to manifest its purpose to exercise its constitutional authority, the regulating power of the State ceases to exist. . . . and we considered it elementary that the police power of the State could only exist from the silence of Congress upon the subject and ceased when Congress acted or manifested its purpose to call into play its exclusive power."

In the recent case of:

Oregon-Washington R. R. & Nav. Co. vs. Washington, decided by this court March 1, 1926, and found in the Advance Opinions of the Supreme Court for March 15, 1926, 70 L. ed. 332, the Chief Justice tersely put the rule in these words:

> "In the relation of the states to the regulation of interstate commerce by Congress there are two fields. There is one in which the state cannot interfere at all, even in the silence of Congress. In the other, and this is the one in which the legitimate exercise of the state's police power brings it into contact with interstate commerce so as to affect that commerce, the state may exercise its police power until Congress has by affirmative legislation occupied the field by regulating interstate commerce and so necessarily has excluded state action."

See also:

Northern Pacific Ry. Co. vs. Washington, 222 U. S. 370;

Southern Ry. Co. vs. Indiana, 236 U. S. 439;

Adams Express Co. vs. Croninger, 226 U. S. 491.

And this silence must be complete. It does not rest with the state to supplement the act of Congress any more than it may vary or take away therefrom.

Quoting again from *Erie Railroad Company vs. New York*, supra:

> "It is not that there may be division of the field of regulation, but an exclusive occupation of it when Congress manifests a purpose to enter it.
>
> "Regulation is not intended to be a mere wanton exercise of power. It is a restriction upon the management of the railroads. It is induced by the public interest or safety, and the 'Hours of Service' law of March 4, 1907, is the judgment of Congress of the extent of the restric-

tion necessary. It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety and of the cost and burden which the railroad must endure to secure it." . . .

See also: *Pennsylvania Railroad Co. vs. Commission*, 250 U. S. 566.

The test to be applied, therefore, is whether Congress has "pre-empted or occupied the field" of legislation on the subject of locomotives and all their parts and appurtenances when used in interstate commerce.

Turn now for a closer inspection and analysis of the Federal statute and its amendments.

THE SCOPE OF THE ACTS OF CONGRESS

The entire scheme, scope and purpose of the Congressional Act must be considered in seeking to determine whether it supersedes the state law, and "that which needs must be implied is of no less force than that which is expressed." In

Savage vs. Jones, 225 U. S. 501,

this court said (page 533):

"For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished —if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect— the state law must yield to the regulation of Congress within the sphere of its delegated power."

The court cites *Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, and the cases of *Northern Pacific Ry. Co. vs. Washington*, and *Southern Ry. Co. vs. Reid*, both cited supra.

What then is the "scheme, scope and purpose" of these several Federal Statutes? By the original act of February 17, 1911, Congress very evidently was undertaking to insure the use of locomotive boilers and boiler appurtenances which were safe to operate. The carriers affected were to be held responsible for the safety of the boilers as well as their condition. Rules and instructions for inspection of the boilers both as to safety and proper condition might be initiated by the carriers, subject to approval by the Interstate Commerce Commission and machinery was provided by which the inspectors appointed under authority of the act might perform their duties of determining whether in point of fact the boilers were safe and in proper condition.

It will be observed that one of the two primary purposes sought to be accomplished by the act was to insure a *safe* boiler. The other purpose was to insure the "proper condition" of the boiler. Even if we give to this second expression the limited and restricted meaning of a requirement that the boiler and appurtenances shall be free from mechanical defects, very clearly the requirement of a *safe* boiler is of much broader significance. The carrier must use a *safe* boiler on its locomotives. Not only shall the boiler be free from physical defects and faulty material, but it shall be *safe* in all particulars, which clearly embraces the requirement that over and above faulty and defective parts there shall be on each locomotive a boiler equipped with all devices and appliances which assure its safety. The statute compels a safe boiler not only in installation and maintenance of sound parts but in the broader sense of compelling the installation of such parts as achieve safety.

The Act is clearly not merely an inspection act—one designed solely for the purpose of having the boilers tested by government representatives for defects. The scheme of the

statute evidently embraces this and more. The several parts may be in quite acceptable condition and yet the boiler, by reason of the failure of its equipment to include certain instruments, devices, or appliances for safety, may be deemed unsafe, and within the condemnation of the statute.

But who is to determine the safety of the boiler and what is the method by which safety is to be accomplished? To the carrier is given, in the first instance, the right to promulgate rules and instructions for the inspection of its locomotive boilers, but these rules and instructions must be approved by the Interstate Commerce Commission which may modify them. Section 5 of the Act of February 17, 1911. It is argued by the appellant that this shows that the statute is one which is limited in operation to an inspection and approval of the boiler or locomotive by the federal inspectors after the carrier had itself inspected it and offered it as one which it proposed to operate. This argument stresses the phrase that "each carrier . . . shall file its rules and regulations for the inspection of locomotive boilers with the chief inspector," provided for in the act. But by unduly emphasizing this clause the argument ignores the plain scope and extent of the statute. The boiler must be safe. Whatever is necessary to this end must be done. Inspection by carrier and federal officer alike is but a process in insuring safety—is but a step towards the end.

In section two of the original Act is found the positive requirement of safety of all locomotive boilers so that when engaged in interstate transportation service they may be employed "without unnecessary peril to life or limb." To be assured of this safety, inspection is considered necessary, and hence this language immediately follows that quoted above:

> "and all boilers shall be inspected from time to time in accordance with the provisions of this act,"

and when inspected they shall:

> "be able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

See also the second section of both amendments.

The title of the Act defines its spirit and purpose, which is the "compelling of common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto." There is no attempt here to aid in the interpretation of an ambiguity in the body of the statute by resort to the title. It is rather the realization, in the body of the Act, of the purpose stated in the title. This court in dealing with the Safety Appliance Acts authorized such a use of the Acts' titles. Thus in the third syllabus in

Southern Ry. Co. vs. Crockett, 234 U. S. 725,

is found this language:

> "This court has heretofore construed the letter of the Safety Appliance Act in the light of its spirit and purpose as indicated by the title no less than by the enacting clauses and that guiding principle should be adhered to."

THE EFFECT OF THE AMENDMENTS OF 1915 AND 1924.

By the two amendments of 1915 and 1924 this purpose of the 1911 Act was broadened into compelling not only a safe boiler, but a safe locomotive and tender in all their parts and appurtenances. By the amendments Congress elected to accomplish the safety not only of locomotive boilers but of the entire locomotive. It extended its jurisdiction to the locomotive in as full a measure as it had previously exercised it as to the boiler alone.

THE RULES PROMULGATED AND IN FORCE.

If to insure safe and suitable boilers Congress could order designated appliances and devices installed in connection therewith, Congress, by the amendments, assumed the same right and authority over the locomotive as a whole. Through the instrumentality of the Interstate Commerce Commission the federal government has exercised this power and has required the installation of a steam gauge (Rule 28); at least two safety valves (Rule 34); at least one water glass and three gauge cocks (Rule 37); two valves or shutoff cocks on the water glass (Rule 38); shields on all water and lubricator glasses (Rule 41); a lamp with all water glasses (Rule 42); ash pans (Rule 105); cylinder cocks (Rule 119); sanding apparatus (Rule 120); whistle (Rule 121); safety bars (Rule 122 b); headlights with designated intensity and devices (Rule 130) and classification lamps and cab lights (Rules 130 and 131).

As the court below pointed out the requirement of the installation of these things by the Commission "is a practical construction by it of its powers entitled to some weight."

The appellant recognizes that the Commission has ordered the installation of certain equipment by the mandatory term "shall have," but argues that the Commission has ordered the carriers to equip their locomotives only with such safety devices and appliances concerning the necessity for which men may not differ. This argument appears to concede the power of the Commission under the Act to order the carriers to equip their locomotives with recognized safety devices or instrumentalties. But the moment this is conceded the limitation of the federal statute to a mere inspection act disappears and the true spirit of the enactment stands forth as one which would compel a safe locomotive in all its parts, accomplishing this purpose not alone by inspection but by any orders di-

rected to that end. Appellant's argument is that while the Commission may have the power to require installation of certain equipment to render the locomotive safe to operate, nevertheless, its authority in this respect is limited to such items as to the necessity of which there can be no debate. Should there be a question about the essentiality of the device to insure safety, the Commission is without authority to require it. But it is conceded that the Act contemplates a required "standard of safety." Who but the Commission is to determine when this "standard of safety" is reached or what constitutes it? And if this duty is reposed in the Commission is it not encumbent upon it to determine what is and what is not essential? If the determination of the question is for the Commission, then, obviously, it may pass upon the advisability of ordering locomotives equipped with this or that appliance which in the judgment of the Commission is "essential to safety." And if it has the power to order a headlight installed as essential safety equipment, can it not order the installation of automatic doors to the fire box? Plainly the debatable necessity for the device is not the criterion by which to measure the power.

Congress never intended that the power of the Commission under the Act and its amendments should be only negative in character and be confined and narrowed to approving or condemning what the carrier might submit as a safe locomotive. Clearly the Commission is given the right to define a safe locomotive. Can it be that in such a definition it must restrict itself to negative terms and is denied the power to make *positive* requirements? Assume that it should determine that a locomotive is not safe to operate unless it have a sanding apparatus. Is there any real difference in an order requiring the installation of such a device, on the one hand, and on the other, an order that if a locomotive is found without a sanding ap-

paratus it shall be deemed unsafe to operate? Appellant admits this right to condemn and reject but denies the right to require by positive order that which promotes safety. Of course there is no distinction except that which may be found in a mere juggling of words. But the appellant to support his argument must find a real difference, because if the right exists to require, by positive order, the use of a sanding apparatus, quite obviously there must co-exist the right and power to require automatic fire box doors, and this, in turn, concedes that Congress has taken jurisdiction over the subject of automatic fire box doors to the utter exclusion of the state.

It is no answer to say that the Commission's power is limited to ordering the locomotive out of service unless it is deemed safe. There is no power in either the Commission or Congress to require the carrier to use any locomotive. At any time the carrier may retire the locomotive. There is no compelling power to force its use. But when it is used, or use of it sought, it must meet the Commission's safety definition. In this definition may be included positive as well as negative requirements.

It must be clear, then, that Congress through the Acts of 1911, 1915 and 1924 has occupied the entire field of the safety of the locomotive used in interstate commerce. There is no occasion for division of the subject-matter. The federal Acts are not mere inspection laws by which the locomotives of carriers are inspected and condemned if found unfit for service. Congress has required a safe locomotive and established the Interstate Commerce Commission as the agency to prescribe by regulation what shall be deemed a safe locomotive. Rules and regulations have been established and when measured by them the locomotive is either safe or unsafe. If safe, it may operate. If unsafe, it is unlawful for it to operate. The Georgia statute, by its terms, invades this field. It supplements

the federal legislation by requiring an automatic door on the fire box of locomotives engaged in interstate commerce. The federal laws and regulations have not seen fit to exact this equipment. Other devices which the Commission, acting under the manifest scope of the congressional legislation, considered essential to safety, have been required, but an automatic door to the fire box is not among the list.

THE SILENCE OF THE RULES AND REGULATIONS ON THE SUBJECT OF AUTOMATIC FIRE BOX DOORS.

The argument up to this point has addressed itself to showing that Congress has taken over the entire field involved in the safety of the locomotive in interstate commerce. We come now to consider the point raised by the appellant that in the absence of federal regulation the state may act.

It is contended that even if the Commission did have power, under the act, to require automatic doors to the fire boxes, it has not exercised it, and that the field is thus left open for such legislation as the state may see fit to pass and that this legislation is valid until the Commission shall have spoken.

It must be observed that in taking this position appellant assumes that Congress has acted and has taken jurisdiction of the subject; that it has left to the Commission the matter of passing such regulations as will carry into effect the purpose which Congress sought to accomplish; but it is urged that the regulations of the Commission being silent upon the subject the state may regulate.

This court has had this same argument presented to it in several cases and has uniformly ruled against the contentions of appellant.

In *Southern Ry. Co. vs. Indiana*, 236 U. S. 439, Mr. Justice Lamar quoted with approval the following language from *Prigg vs. Pennsylvania*, 16 Pet. 539, 617:

"If Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the state legislatures have a right to interfere; and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it . . . the will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed."

We have heretofore had occasion to refer to the late and controlling case of *Oregon-Washington R. R. & Nav. Co. vs. Washington*, supra. In that case the Director of Agriculture of the State of Washington promulgated quarantine regulations against described areas in adjoining states by which the importation from those areas of alfalfa hay and meal into the state of Washington was forbidden except under named conditions. In passing these regulations the state Director of Agriculture was acting under a statute of the State of Washington which granted him the power. The validity of the Washington law and the quarantine order of the state officer were objected to on the ground that the United States government had exercised its paramount authority over the subject and had assumed control thereof. The State of Washington stressed the point that even though it was conceded that Congress had assumed control of the horticulture and agriculture of the states and had given to the Secretary of Agriculture of the United States the control thereof, yet, as this official had not seen fit to act, it was left open for the state to act, and its legislation was valid until such time as the Secretary of Agri-

culture should speak. In disposing of this contention the court said:

> "It is suggested that the states may act in the absence of any action by the Secretary of Agriculture; that it is left to him to allow the states to quarantine, and that if he does not act there is no invalidity in the state action. Such construction as that cannot be given to the Federal statute. The obligation to act without respect to the states is put directly upon the Secretary of Agriculture whenever quarantine, in his judgment, is necessary. When he does not act, it must be presumed that it is not necessary. With the Federal law in force, state action is illegal and unwarranted."

With the whole field occupied by Congress silence upon a phase of the subject is itself a regulation. It is the equivalent of a determination that no action is needed. There is no necessity to pass a rule couched in negative terms. Failure to pass any rule or order at all brings about that result. The state has no more power to change such a rule of silence than it has to modify or repeal a positive command issued under the sanction of the paramount authority within the field.

PREVIOUS DECISIONS OF THIS COURT DEALING WITH THE ACT OF FEBRUARY 17, 1911.

In

Atlantic Coast Line R. R. Co. vs. Georgia, 234 U. S. 280, this court was asked to hold invalid a statute of the state of Georgia which prescribed headlights of certain character upon locomotives. The opposition to the statute rested upon the assertion that Congress had acted and the Act of February 17, 1911, "relating to locomotive boilers" was among the federal statutes relied upon. The court rejected the argument, holding that a headlight was no part of a locomotive boiler and that neither this Act nor any other safety appliance act of Congress related to or regulated locomotive headlights. Of course

the Act of March 4, 1915, had not then been passed and congressional action had not been extended to cover the "entire locomotive." As the court said:

> "It does not appear, however, either that Congress has acted or that the Commission, under the authority of Congress, had established any regulation so far as headlights are concerned."

The case of

Vandalia R. R. Co. vs. Indiana, 242 U. S. 254,

reached this court after the passage of the Act of March 4, 1915. It involved a headlight statute of Indiana similar to the Georgia act passed on in *Atlantic Coast Line vs. Georgia*, supra. It differed from the *Georgia Case* only in that after the decision and judgment of the State Supreme Court upholding the validity of the Indiana law the Act of March 4, 1915, extending the provisions of the original Boiler Act had been passed. It was said that this distinguished the case from the *Georgia Case* and took it out of the controlling ruling there made. This position was held to be untenable, the court saying:

> "...the decision of the Supreme Court of Indiana, refusing an injunction to restrain the enforcement of the state commission's order, was rendered and judgment entered before the passage by Congress of the act referred to. Obviously, we cannot say that by that decision and judgment any right of plaintiff in error under a law of the United States was infringed, within the meaning of Section 237, Jud. Code, when the law creating the supposed right was not enacted until after the judgment."

But the court very clearly intimated that the rule would be different if the validity of the state statute respecting locomotive headlights was challenged after the passage of the 1915 Act of Congress extending its jurisdiction over the entire locomotive and all its appurtenances. For it was said:

"If, however, by virtue of the Act of 1915, or of any action heretofore or hereafter taken by the Interstate Commerce Commission under it, plaintiff in error is entitled to an injunction against the further enforcement of the order of the state commission, that right may be asserted in another action and will not be prejudiced by our present decision."

THE ALABAMA DECISION

Another "locomotive headlight case" reached the Supreme Court of Alabama and the decision of that court in

Louisville & Nashville R. R. Co. vs. State, 16 Ala. App., 199; 76 So. 505,

will be found well reasoned and illuminating. The question was the validity of an Alabama statute prescribing a designated character of locomotive headlight. The state act was attacked on the ground that Congress had exercised its exclusive power over the subject by the Act of 1911 and the amendment of March 4, 1915, and that the state law had been superseded. As a matter of special importance it should be noted that while the litigation over the validity of the Alabama law arose after the 1915 amendment, no regulation or order respecting locomotive headlights had been promulgated by the Commission under authority of the amendment. The case stood, therefore, as one involving the question as to whether by the amendment alone, unfortified by regulation, rule or order, Congress had so evidenced its intention to occupy the field as to destroy all state legislation on the subject. In a strong and convincing opinion the Alabama Supreme Court holds the state law to be nugatory, concluding with these words:

"When the amendatory act of Congress approved March 4, 1915, is read in connection with the Safe Locomotive

Boilers Act of February 17, 1911, we cannot escape the conclusion that the intention of Congress is plain that the states must be excluded from the right to legislate within the field to which the several original acts, and the amendatory act, extended the federal authority. It is immaterial that the final rules on the subject of headlights to be used on such locomotives were not promulgated by the Interstate Commerce Commission until, respectively, June 6, and December 26, 1916, after the commission of the alleged offense for which the prosecution was had.

"We are of the opinion that the act of the Alabama Legislature of July 17, 1915, is contrary to the expressed purpose and scope of the amendatory act of Congress of March 4, 1915, and that as to engines engaged in interstate commerce it has no application."

CONCLUSION

Extending, as they do, the authority of Congress over the entire locomotive and all its appurtenances, the amendments of 1915 and 1924, evince the clear intention of Congress to take exclusive control of the subject matter. There is to be no longer a division of jurisdiction. State laws and policies must give way before the dominant authority of Congress.

If this, then, be the scope of the federal statutes, the Georgia Act requiring automatic fire box doors invades the field occupied by paramount legislation and it is thereby rendered illegal.

It is not sufficient answer to say that the absence of regulation by the Interstate Commerce Commission gives authority to the state to regulate until the Commission shall have spoken on the particular subject. It is enough that Congress has

acted. The states have been silenced. Failure of the Commission to regulate creates the presumption that no regulation is necessary. The silence of the Commission is itself a regulation which the states may not repeal.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1926, No. 87.
OCTOBER TERM, 1925, No. 386.

GEORGE M. NAPIER, Attorney General of Georgia,
Appellant,

vs.

ATLANTIC COAST LINE RAILROAD COMPANY,
Appellee.

APPEAL FROM DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF GEORGIA.

Reply Brief on Behalf of Appellee

ROBERT C. ALSTON,
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CASES CITED

	Pages of Brief.
Baltimore & Ohio R. Co. v. Groeger, 266 U. S. 521.	2
Chicago & N. W. Ry. Co. vs. Railroad Commission, 205 N. W. 932	10
Chicago & N. W. Ry. Co. v. Michigan Pub. Util. Com., 208 N. W. 62	10
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REPLY BRIEF ON BEHALF OF APPELLEE.

Appellee respectfully requests permission of this Court to file this brief in reply to the briefs of appellant.

At page 4 of the original brief of appellant, statement is made as to the reasons assigned by appellee for its claim that the Act of the Georgia Legislature under review is null and void and amongst these reasons is that jurisdiction of the subject has been taken by Congress under the Acts known as the Federal Boiler Inspection Act and the Amendment thereto of

March 4, 1915. No reference is there made to the amendment of June 7, 1924, which amendment is set out with some particularity at page 6 of the record.

At pages 15 and 16 of appellant's original brief, the regulations of the Commission are referred to in order to establish the proposition that those regulations are in the nature of establishing "standards of safety." It is there claimed that "Wherever the regulation states that the boiler 'shall have' a particular appliance, it is plain that the item referred to is an indispensable part of or appurtenance to the boiler or locomotive and essential to safety in operation."

The regulations of the Commission which are referred to, are not a part of the record in this case. It is very difficult to understand how the appellant contends that the Legislature of the State of Georgia has the right to adopt an Act requiring installation of fire-box doors and still to hold that those things do not fall within the "standards of safety." It would appear that if the Legislature of Georgia has the power to adopt such an Act, it is because it undertakes to require a safety appliance. At page 17 it is argued that

> "The Commission has undoubtedly recognized this situation and has narrowed the use of the mandatory term 'shall have' to such items as are 'essential' to 'safety in operation' beyond debate."

There is no justification for this assumption, but if there were, the Commission has no right to narrow or otherwise change the scope of the Act.

At page 18, appellant cites the case of *Baltimore and O. R. Co. vs. Groeger*, 266 U. S., 521. It is difficult to understand just what comfort appellant can get out of this case, for the Court holds that under Section 2 of the Boiler Inspecion Act

"Defendant's duty to have the boiler in a safe condition to operate so that it could be used without unnecessary peril to its employees was absolute and continuing."

The Court was dealing with a case in which a homicide of an engineer had occurred from the explosion of a boiler. What was said as to the duty of the defendant as to the boiler applies to "the entire locomotive, boiler and tender and all parts thereof." Thus, under this decision the power of the Government is directly exercised by virtue of this Act over the entire locomotive, boiler and tender and all parts and appurtenances thereof. If the Federal power is thus exercised the State's power is at an end.

At page 22 of the brief, appellant again refers to an entirely different proceeding and to a hearing before the Interstate Commerce Commission as to the operation of bell ringers. No part of this proceeding is in this record; but no part of the brief there referred to appears to deal with anything involved in this case, for we are not dealing with how a fire-box door shall be operated, if it be installed, but we are dealing with the question as to whether the subject of installation of fire-box doors has been so taken over by the Federal Government as to be without the power of the State Government. The argument at this part of the brief not only goes out of the record to find facts not within the record, but drops into things which are absolutely irrelevant.

At page 24 of appellant's brief, it is stated:

"The mere grant of power to Congress does not exclude the States."

That may or may not be true. It certainly is not always true. Appellant at the same point said:

> "The exercise of the power by Congress, however, is paramount, to the exclusion of the states, and any and all state statutes in conflict with the Federal regulations are rendered inoperative and void."

Conflict with the Federal statute or regulation is not an element essential to the invalidity of State action. State action cannot complement Federal action.

> "The test, however, is not whether the State legislation is in conflict with the details of the Federal law or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exclusive control."
>
> *Southern Ry. vs. Railroad Commission of Indiana*, 236 U. S., 439, 448.

This was a safety appliance case.

At page 25 of appellant's brief, the statement is reiterated and carried a step further, for it is there said:

> "Federal statutes, however, are strictly construed and state regulations are valid unless they are repugnant to or in conflict with the Federal regulations or Congress has clearly manifested an intention to fully occupy the field."

Why should the Federal statutes on this subject be "strictly construed?" What authority is there for that?

At page 26, appellant quotes from the opinion of this Court in the Indiana Headlight case, 242 U. S., 255, in part as follows:

> "The amendment of 1915 extends the provisions *respecting inspections*, etc., to the entire locomotive and its appurtenances."

From this it is argued that the Federal Act is an "inspection" law. Under the Boiler Inspection Act the right of inspection extends not only to the Boiler but to the entire locomotive. The inspection is not for purposes of parade or ornament. It is for the purpose of seeing that all parts of the locomotive, boiler, tender and the appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb. 2nd Section, Act of 1924.

At page 28, appellant cites Roberts' Federal Liabilities of Carriers, Volume 1, Section 17, underscoring these words:

> "If the State and the national law do not apply to the same subject matter, both are valid."

In the case at bar, the national law covers every part of the locomotive, its boiler, tender and all parts and appurtenances thereof. The fire-box door is intended to be attached to the boiler as a part thereof or as an appurtenance thereto, so they both cover the same subject matter. The object of the Federal law is to make and keep a locomotive, its boiler, tender and all parts and appurtenances thereof in proper condition and safe to operate. The Act of the Georgia Legislature has no ground for existence, except that it undertakes to accomplish the same purposes. On the same page, the appellant declares that the subject matter covered by the Boiler Inspection Act and its amendments "is to promote safety in operation by requiring adequate inspections."

He then argues (page 28) that there is nothing in the record to indicate that

> "The purpose of the automatic fire door provided for is to promote safety in operation. It is claimed that on the happening of certain contingencies, it

> tends to increase the safety of the engineer and fireman in the cab and may incidentally effect and increase safety in operation, but the real purpose is for the protection, health, comfort, convenience and general welfare of those engaged in firing and driving the locomotives."

We confess our inability to understand this argument. Under the statements made, why can it be thought that the two acts do not cover the same subject? The subject of the National Act is the locomotive, boiler, tender and all of its parts and appurtenances. The object to be accomplished through legislating on these subjects is the safety of employees and of the public, and to protect the health, comfort, convenience and general welfare of certain employees, and of the public. The record in the case shows (Record 20) that the witness Elliott introduced by appellant said that

> "Said door is a safety device," etc.

The same language is used by the witness Meredith (Record p. 21). This part of the brief seems to be contrary to the evidence offered by appellant in the Court below and contrary to law and reason.

At page 4 of reply brief of appellant, a distinction is drawn between the power of the Commission to "order" and its power to "require" certain equipment as the standard of safety. We do not understand that there is a difference in a decree of a governmental body which "orders" and one which "requires" that a certain thing be done. If there be some shadowy distinction in the meaning of these two words, there is no practical distinction when they are used in connection with this Act. If the locomotive is used in circumstances which make it out of order and not in proper condition and safe to operate, the act of the carrier is unlawful.

The duties of the inspectors are set out in a good deal of detail in the original Act of 1911. For instance, each inspector must make personal inspection of the locomotives under his care. He shall see that the carriers make inspections in accordance with the rules and regulations established by the Commission, and that carriers repair the defects which such inspections disclose before the locomotive can be again put in service. If a common carrier violates the Act or any rule or regulation made under its provisions, or any lawful order of any inspector, it is subject to punishment provided in Section 9 of the Act of 1911. So it would appear that, to try to distinguish between the effect of the power of the Commission to *order* and its power to *require*, can produce no practical result.

At page 6 of the reply brief, it is asserted:

> "An automatic fire door is not a safety appliance but is a protective device."

We submit that no practical distinction exists between a "safety appliance" and a "protective device." We presume that this language is used for the purpose of carrying forward the argument that the Georgia Act and the Federal Act deal with two different subject matters. A fire-box door is of course an appurtenance to the boiler to which it is attached. The fire-box is used for heating the boiler. The boiler is a part of the locomotive, and if this be true, jurisdiction over the subject has been taken by the Federal Government.

Apparently, appellant's thought is that if the State undertakes to legislate over the fire-box door because it is a protective device and the Federal Government undertakes to legislate about it because it is a safety appliance, there is no conflict; but the brief seems to destroy itself even in its own

field, for it proceeds to state that it (the fire-box door) may incidentally promote safety after emergency has risen.

In the last analysis, appellant has thus placed his case upon two propositions: the one is that there is a distinction between the power of the Commission to order and its power to require; the other is that there is a distinction between a safety appliance and a protective device. We cannot understand these distinctions, but if there are distinctions, in what way does that destroy the jurisdiction which the Federal Government had undertaken to exercise over the locomotive, its boiler, tender and all parts thereof and appurtenances thereto? It had the right to exercise that jurisdiction on the ground that Congress desired either a protective device or a safety appliance.

Appellant again apparently proceeds on the theory that jurisdiction of the Federal Government is dependent upon action of the Commission. We assert that the contrary is true. The Boiler Inspection Act by its own terms makes it unlawful for a carrier by railroad to use or to permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, etc. Certain methods of ascertaining safety are provided for and certain methods of enforcing this law are set up, but the thing that is enforced is the Act. It would be unlawful for a carrier by railroad to operate an unsafe locomotive if there were no rules or regulations of the Commission.

It appears from the record (page 21) that a good many fire-box doors have been installed on one of the divisions of the Southern Railway. It is pleaded by the defendant that a good many fire-box doors are in service (R. 13). It is

pleaded by the defendant that attention of the Commission has been called to the use of fire-box doors by the Chief Inspector (R. 12 and 13). The Commission may very well feel that this subject is solving itself without its orders, and that there are other things which should require the attention of the Railroads as to the safety of the public and of its employees, which are of greater moment than fire-box doors. It is made clear by the record that the failure of the Commission to act on this subject is not because the subject has not been brought to its attention—it is shown by the record that the subject has been a matter of consideration by the Commission—and certainly this is a perfect proof that silence is, itself, regulation; but, as pointed out above, the jurisdiction of the Federal Government is exercised over this subject directly through its Congressional enactment.

Under Section 5 of the original Act, each carrier subject to the Act is required to file rules and instructions for the inspection of locomotive boilers. If these rules are not filed, the chief inspector is required to prepare rules and instructions not inconsistent with the Act, so that there are, at all times, standards for the condition of the locomotive, boiler, tender and all its parts. Besides, under Section 6 of the Act, each inspector is required to exercise a very definite jurisdiction over each locomotive ordinarily housed or repaired in his district. He is required to see that the carriers make inspection in accordance with the rules and regulations established or approved by the Commission and that the carriers repair the defects which such inspections disclose before the boiler, or boilers, or appurtenances pertaining thereto, are again put in service.

No doubt the words "boiler or boilers or appurtenances pertaining thereto," since the Acts of 1915 and 1924, mean "the locomotive, its boiler, tender and all parts and appurtenances."

Appellant refers to the case of *Chicago & Northwestern Railway Company vs. Railroad Commission*, 205 N. W., 932, from the Supreme Court of Wisconsin. This case is now before this Honorable Court on an appeal on writ of error. The Wisconsin Court undertook to draw a distinction between the exercise of jurisdiction in order to make the locomotive safe, and the exercise of jurisdiction for the purpose of preserving health, the Court saying:

> "However, the public health and public safety afford two distinct fields of legislation."

Page 934.

The position seems to be entirely too narrow and to be taken on an erroneous conception. The question is, has Congress taken jurisdiction? It is not what caused Congress to take jurisdiction. If the jurisdiction exists, it makes no difference what was the motive that moved Congress to exercise it; but that can have no application to the case at bar for the reason that there can be no doubt that what is here concerned is the safety of the public and of employees. It can make no difference in results whether the fire-box door is a "safety appliance" or "a protective device."

The case of *Chicago and Northwestern Railway Company vs. Michigan Public Utilities Commission*, 208 N. W., 62, from the Supreme Court of Michigan, involves very much the same question as in the case from Wisconsin, 205 N. W., 932. The decision of the lower court was affirmed by an evenly divided Court. The opinion written by Mr. Justice Steere concurred in by the Chief Justice and two other justices, does not follow the Wisconsin case. It approves the decision of the District Court for the Northern District of Georgia in the case at bar. The opinion of the other justices who were not for affirmance, undertaking to draw a dis-

tinction between health and safety, apparently falls into the line of reasoning of the Wisconsin case. For the reasons stated as to the Wisconsin case, the opinion of the justices in the Michigan case who were for affirmance, cannot apply to the case now involved, even if the opinion were correct.

The distinction which is made in the Wisconsin case and that which is undertaken to be made by four of the justices in the Michigan case, as between safety and health, appear to overlook the provisions of Section 2 of the Boiler Act, which make it unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender and all parts and appurtenances thereof *are in proper condition* and safe to operate in the service to which the same are put.

The condition must be such that it can be used in the service without unnecessary "*peril to life or limb.*" The thought in the decisions under consideration appears to have been that the Federal Government has taken jurisdiction over the things which make for violent injury, such as being burned from escaping fire or scalded from escaping steam; but that it had not taken jurisdiction over those things which would put the engine out of "proper condition" because of cold. In other words, the Federal Government had taken jurisdiction over the condition of the engine as far as it is affected by heat, but not as it is affected by cold. If the engine is in such status that the water gauge might explode and injure the hand or eye of an engineer, jurisdiction of the Federal Government exists; but if it is in such condition that undue cold can come in and injure the engineer's lungs, the Federal Government had exerted no jurisdiction. If the "peril to life" of the engineer is caused because the engine is in an improper mechanical condition, the Federal Government has occupied the field; but if the peril to the engineer's life comes from an

improper condition which let in too much cold air, the Federal Government has taken no jurisdiction. The distinction is too close for practical use. The Federal Government has taken that jurisdiction over the "condition" of the engine which is sufficient to require that the engine (meaning the locomotive, boiler, tender and its appurtenances) be employed in the active service of the carrier without unnecessary "peril to life or limb." It makes no difference whether that which produces the imperilling condition is due to heat or cold, to mechanical or other circumstances. The decisions in Wisconsin and the Michigan cases should, we respectfully submit, be reversed.

But it makes no difference, as far as the case at bar is concerned, for, under the principles announced in those decisions, the present case should, we respectfully submit, be affirmed.

It is plainly right that there should be but one governmental jurisdiction exercised over a locomotive in determining whether it is in proper condition to operate. That jurisdiction has been exercised by Congress and the States have been excluded from the field.

Respectfully submitted,

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Atlanta, Ga.

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In The Supreme Court of the United States

OCTOBER TERM, 1926

GEORGE M. NAPIER,
Attorney General of the
State of Georgia,
Appellant,
vs.
ATLANTA COAST LINE RAILROAD
COMPANY,
Appellee.

No. [redacted] 87

BRIEF AMICUS CURIAE.

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In The Supreme Court of the United States

OCTOBER TERM, 1926

GEORGE M. NAPIER,
Attorney General of the
State of Georgia,
Appellant,
vs.
ATLANTA COAST LINE RAILROAD
COMPANY,
Appellee.

No. 386.

BRIEF AMICUS CURIAE.

The question involved in the above entitled cause is one in which the people of this State are vitally interested. The legislature in its regular session of 1921, enacted Act Number 139, entitled:

> "An Act requiring railroad companies to equip locomotive engines with either cab curtains or vestibule cabs, providing a penalty for a violation of this act and making it the duty of the Michigan Public Utilities Commission to enforce its provisions."

The title and section 1 of the act were amended by Act Number 127 of the Public Acts of 1923.

Under this act the Public Utilities Commission of this State was empowered to require railroad companies to

equip their engines operated within the State with "suitable cab curtains, vestibule cabs, housing and other devices for the safety and health of locomotive engineer men not in conflict with the rulings of the Interstate Commerce Commission" during certain seasons of the year. By virtue of this statute, the Michigan Public Utilities Commission issued an order requiring the Chicago & Northwestern Railway Company to equip its locomotives with appliances as provided by the act above mentioned. The railroad company thereupon filed a bill in the Circuit Court for the County of Ingham to restrain the Commission from enforcing the order. The Circuit Court denied the prayer of the bill and the case was appealed to the Supreme Court of this State which sustained, by a divided court, the decision of the lower court on the ground that the State Legislature could enact legislation covering a field which had not already been covered by Congressional legislation. The case is reported as the Chicago & Northwestern Railway Company vs. Michigan Public Utilities Commission, 233 Mich. 676. The prevailing opinion covers the question so completely and contains such a full citation of authorities that we desire to direct the attention of this Court to that opinion rather than attempt to cover the same ground in this brief. It was the contention of the State in that case, and that contention would apply equally to the instant case, that

I.

In the absence of legislation by Congress, the States are not denied the exercise of their powers to regulate railroad equipment and operation within their territory.

This doctrine was thoroughly discussed and it seems definitely settled in the case of Atlanta Coast Line Rail-

road Company vs. Georgia, 234 U. S. 280, 34 Sup. Ct. Rep. 829. The question was again before this Court in the case of the Vandalia Railroad Company vs. Public Service Commission of Indiana, 242 U. S. 255, 37 Sup. Ct. Rep. 93. Justice Hughes gave a very complete history of the Federal legislation in the Georgia case up to the time of that decision on page 832 to which the attention of this Court is directed for a history of legislation covering the question under consideration.

II.

There is no Federal regulation either by act of Congress or by any order of the Interstate Commerce Commission covering the subject matter under consideration in the instant case.

It will be noted from a reading of these decisions and also from a review of the legislation cited in the Supreme Court decisions of this State, reported in 233 Michigan, 676, that neither Congress nor the Interstate Commerce Commission, acting under its authority, has established any regulation over the subject matter involved in the instant case so far as we have been able to ascertain, after a careful inspection of the Federal statutes and the regulations of the Interstate Commerce Commission.

III.

State legislation incidentally affecting interstate commerce is not superseded by Federal legislation on the same subject matter unless there is an actual repugnancy between the State regulation and the Federal regulation and the purpose of Congress clearly appears to super-

sede the State regulation in pursuance of its paramount power.

It will be noted from what has already been said and from the authorities and acts of Congress cited and referred to in the Supreme Court decisions of this State hereinbefore mentioned, that there is no act of Congress or regulation of the Interstate Commerce Commission directly affecting the question involved in the case now under consideration and even should it incidentally affect an act of Congress or a regulation of the Interstate Commerce Commission that fact alone would not render legislation of that kind invalid. In this connection we call the Court's attention to the case of Missouri, Kansas & Texas Railroad Company vs. S. O. Harris, 234 U. S. 412, 34 Sup. Ct. Rep. 790, in which Mr. Justice Pitney, speaking for the Court, very clearly and fully discussed this proposition on page 793 and in this connection we would also call the Court's attention to the following cases:

Savage vs. Jones, 225 U. S. 501, 32 Sup. Ct. Rep. 715;
Missouri K. & T. Co. v. Haber, 169 U. S. 613, 18 Sup. Ct. Rep. 488;
N. Y., N. H. & H. Railroad vs. New York, 165 U. S. 628, 17 Sup. Ct. Rep. 418;
Telegraph Company vs. James, 162 U. S. 650, 16 Sup. Ct. Rep., 934;
Smith vs. Alabama, 124 U. S. 465, 8 Sup. Ct. Rep., 564;
Reid vs. People of State of Colorado, 187 U. S. 137; 23 Sup. Ct. Rep., 92.

It is our conclusion, therefore, that in the absence of legislation by Congress, the States may regulate railroad equipment and operation within their territory and that there is no Federal regulation or rule of the Interstate

Commerce Commission regulating the subject matter of the legislation by the State of Georgia under consideration, but even if Congress has enacted legislation covering a certain field the States are not prohibited from enacting legislation on the same subject matter which only incidentally affects interstate commerce.

It is the contention, therefore, that the Court below in the instant case was in error in holding that the act of the legislature of the State of Georgia was unconstitutional and invalid and in issuing an injunction restraining the appellant from enforcing said act and that such decree should be reversed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 87, 310 and 311.—October Term, 1926.

Geo. M. Napier, Attorney General, Appellant, vs. Atlantic Coast Line R. R. Co.	Appeal from the District Court of the United States for the Northern District of Georgia.
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[November 29, 1926.]

Mr. Justice Brandeis delivered the opinion of the Court.

These cases require a determination of the scope and effect of the federal Locomotive Boiler Inspection Act. February 17, 1911, c. 103, 36 Stat. 913, as amended March 4, 1915, c. 169, 38 Stat. 1192, and June 7, 1924, c. 355, 43 Stat. 659. The main question, which is the same in the three cases, is one of statutory construction. It is whether the Boiler Inspection Act has occupied the field of regulating locomotive equipment used on a highway of interstate commerce, so as to preclude state legislation. Congress obviously has power to do so. Compare *Northern Pacific R. R. Co.* v. *Washington*, 222 U. S. 370; *Pennsylvania R. R. Co.* v. *Public Service Commission*, 250 U. S. 566; *Oregon-Washington R. R. & Nav. Co.* v. *Washington*, 270 U. S. 87.

No 87 involves a Georgia statute which prescribes an automatic door to the firebox, Act of August 13, 1924, Georgia Laws, 1924, p. 173. That case is here on direct appeal from a final decree of the federal district court, entered December 23,

1924, granting the injunction. 2 Fed. (2d) 891. Nos. 310 and 311 involve a Wisconsin statute which prescribes a cab curtain, Wisconsin Statutes, § 1806a, c. 139, Laws of 1923. These cases are here on writs of error to the Supreme Court of that State, which affirmed a judgment denying the injunction. 188 Wis. 232. In Georgia, the details of the device were prescribed by the legislature. In Wisconsin, the specifications were prescribed by an order of the state Railroad Commission. In each case, an interstate carrier sought to enjoin state officials from enforcing, in respect to locomotives used on its lines, a state law which prohibits use within the State of locomotives not equipped with the device prescribed. Some of the engines were being operated entirely within the State, some across the state line to and from adjoining States. It is conceded that the federal Safety Appliance and Boiler Inspection Acts apply to a locomotive used on a highway of interstate commerce, even if it is operated wholly within one State and is not engaged in hauling interstate freight or passengers. *Southern Ry. Co.* v. *United States*, 222 U. S. 20; *Texas & Pacific Ry.* v. *Rigsby*, 241 U. S. 33.

Prior to the passage of the Boiler Inspection Act, Congress had, by the Safety Appliance Act and several amendments, itself made requirements concerning the equipment of locomotives used in interstate commerce. It had required a power driving-wheel brake, automatic couplers, grabirons or handholds, drawbars, safety ash pans, and sill steps. Acts of March 2, 1893, c. 196, 27 Stat. 531; March 2, 1903, c. 976, 32 Stat. 943; May 30, 1908, c. 225, 35 Stat. 476; April 14, 1910, c. 160, 36 Stat. 298. Congress first conferred upon the Interstate Commerce Commission power in respect to locomotive equipment in 1911. The original Act applied only to the boiler. It is entitled: "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto." The provisions of that Act were extended in 1915 to "include the entire locomotive and tender and all parts and appurtenances thereof." In 1924, § 2 of the original Act was amended to read as follows:

"That it shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier

without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of this Act and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for."

Other sections confer upon Inspectors and the Commission power to prescribe requirements and establish rules to secure compliance with the provisions of § 2. From time to time since the passage of the original Act, the Commission has required that locomotives used in interstate commerce be equipped with various devices.[1] But it has made no order requiring either a particular type of fire-box door or a cab curtain. Nor has Congress legislated specifically in respect to either device.

The Georgia Act provides that the "automatic door shall be so constructed and operated by steam, compressed air or electricity, as deemed best and most efficient by officer of such railroad. The device for operating such door shall be so constructed that it may be operated by the fireman of said engine by means of a push-button or other appliance located on the floor of the engine deck or floor of the tender . . . to enable the fireman while firing such engine by pressure with his feet to operate such door for firing of such engine." The automatic fire-door conserves the health of the fireman by protecting him from exposures to extremes of heat and cold while performing his duties; conserves his eyesight by reducing the amount and extent of exposure to the glare of the fire; protects the safety of the employees in the event of an explosion in the fire-box; and incidentally might affect the safety of the train, after such an explosion, in that employees, being safe, might be able to bring the train under control. The automatic fire-door would also serve to protect travellers upon highways crossed by the railroad at grade. For the fireman is required to aid the engineer in keeping a lookout; and with use of

[1]Steam gauge (Rule 28); safety valves (Rule 34); water glass and gauge cocks (Rule 37); shutoff and drain cocks (Rule 38); shields on water and lubricator glasses (Rule 41); lamps in connection with water glasses (Rule 42;) particular types of ash pans (Rule 105); "clear vision" windows in cabs (Rule 116); cylinder cocks (Rule 119); sanding apparatus (Rule 120); whistle (Rule 121); safety bars or chains (Rule 122b); chafing irons (Rule 123); headlights with designated intensity and devices (Rules 129, 131); classification lamps (Rule 130); cab lights (Rule 132); safety valve for oil supply pipe (Rule 154).

the old type swinging door this is not continuously possible. The glare of the flame when the door is open practically blinds the fireman for a time.

The purpose of the cab curtain is to protect engineers and firemen from the weather during the winter season. The Act made it unlawful to use "between the fifteenth day of November and the first day of April of each year any locomotive engine not equipped with suitable and approved cab curtains. Such curtains shall be so constructed as to efficiently enclose the openings between the engine cab and the water tank or coal tender attached to such locomotive engine. The windows of the cab shall be properly and closely fitted and all openings for levers or pipes and all other openings whatsoever through which cold or drafts may bring discomfort to the occupants, shall be efficiently protected in such manner as may be required and according to plans approved by the Railroad Commission." Various types of cab curtains had been voluntarily installed by the carriers. But those installed by most of the carriers were such that snow entered the cabs in large quantities; that it saturated the clothing of engineers and firemen; and that the exposure caused great discomfort and danger of serious illness. The State Commission found that the plans for cab curtains submitted by the several carriers were, with one exception, not "fully suitable and effective for the protection of the health, comfort and welfare of the engine men"; and ordered particular requirements.

Each device was prescribed by the State primarily to promote the health and comfort of engineers and firemen. Each state requirement may be assumed to be a proper exercise of its police power, unless the measure violates the Commerce Clause. It may be assumed, also, that there is no physical conflict between the devices required by the State and those specifically prescribed by Congress or the Interstate Commerce Commission;[2] and that the interference with commerce resulting from the state legislation would be incidental only. The intention of Congress to exclude States from exerting their police power must be clearly manifested, *Reid* v. *Colorado*, 187 U. S. 137, 148; *Savage* v. *Jones*, 225 U. S. 501, 533. Does the

[2]It is contended by the carriers that the order of the Wisconsin Commission is, in some minor respects, inconsistent with requirements prescribed, in other connections, by the Interstate Commerce Commission. For reasons to be stated, we have no occasion to examine into the alleged conflict.

legislation of Congress manifest the intention to occupy the entire field of regulating locomotive equipment? Obviously it did not do so by the Safety Appliance Act, since its requirements are specific. It did not do so by the original Boiler Inspection Act, since its provisions were limited to the boiler. *Atlantic Coast Line R. R. Co.* v. *Georgia*, 234 U. S. 280. But the power delegated to the Commission by the Boiler Inspection Act as amended is a general one. It extends to the design, the construction and the material of every part of the locomotive and tender and of all appurtenances.

The requirements here in question are, in their nature, within the scope of the authority delegated to the Commission. An automatic firedoor and an effective cab curtain may promote safety. Keeping firemen and engineers in good health, like preventing excessive fatigue through limiting the hours of service, clearly does so, although indirectly; and it may be found that to promote their comfort would likewise promote safety. It is argued that the authority delegated to the Commission does not extend to ordering the use or installation of equipment of any kind, *Baltimore & Ohio R. R. Co.* v. *Groeger*, 266 U. S. 521; and that Congress has definitely reserved that power to itself, *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 167 U. S. 479; *Atlantic Coast Line R. R. Co.* v. *Georgia*, 234 U. S. 280; *United States* v. *Pennsylvania R. R. Co.*, 242 U. S. 208. The question whether the Boiler Inspection Act confers upon the Interstate Commerce Commission power to specify the sort of equipment to be used on locomotives was left open in *Vandalia R. R. Co.* v. *Public Service Commission*, 242 U. S. 255. We think that power was conferred. The duty of the Commission is not merely to inspect. It is, also, to prescribe the rules and regulations by which fitness for service shall be determined. Unless these rules and regulations are complied with, the engine is not "in proper condition" for operation. Thus the Commission sets the standard. By setting the standard it imposes requirements. The power to require specific devices was exercised before the amendment of 1915, and has been extensively exercised since.

The argument mainly urged by the States in support of the claim that Congress has not occupied the entire field, is that the federal and the state laws are aimed at distinct and different evils; that the federal regulation endeavors solely to prevent accidental injury in the operation of trains, whereas the state regulation

endeavors to prevent sickness and disease due to excessive and unnecessary exposure; and that whether Congress has entered a field must be determined by the object sought through the legislation, rather than the physical elements affected by it. Did Congress intend that there might still be state regulation of locomotives, if the measure was directed primarily to the promotion of health and comfort and affected safety, if at all, only incidentally?

The federal and the state statutes are directed to the same subject—the equipment of locomotives. They operate upon the same object. It is suggested that the power delegated to the Commission has been exerted only in respect to minor changes or additions. But this, if true, is not of legal significance. It is also urged that, even if the Commission has power to prescribe an automatic firebox door and a cab curtain, it has not done so; and that it has made no other requirement inconsistent with the state legislation. This, also, if true, is without legal significance. The fact that the Commission has not seen fit to exercise its authority to the full extent conferred, has no bearing upon the construction of the Act delegating the power. We hold that state legislation is precluded, because the Boiler Inspection Act, as we construe it, was intended to occupy the field. The broad scope of the authority conferred upon the Commission leads to that conclusion. Because the standard set by the Commission must prevail, requirements by the States are precluded, however commendable or however different their purpose. Compare *Louisville & Nashville R. Co.* v. *State*, 16 Ala. App. 199; *Whish* v. *Public Service Commission*, 205 App. Div. 756; 240 N. Y. 677; *Staten Island Rapid Transit Co.* v. *Public Service Commission*, — F. (2d) —.

If the protection now afforded by the Commission's rules is deemed inadequate, application for relief must be made to it. The Commission's power is ample. Obviously, the rules to be prescribed for this purpose need not be uniform throughout the United States; or at all seasons; or for all classes of service.

In No. 87, Decree affirmed.
In Nos. 310 and 311, judgment reversed.

A true copy.

Test:

Clerk, Supreme Court. U. S.